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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 39

HANK AVERY, PETITIONER,

vs.

MIDLAND COUNTY, TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR CERTIORARI FILED JANUARY 10, 1967
CERTIORARI GRANTED JUNE 12, 1967

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the District Court of Midland County, Texas, 142nd Judicial District		
Plaintiff, Hank Avery's Sixth amended original petition	321	1
Fifth amended original answer of Alvey A. Bryant, Clark Moreland and Louis Osborne	179	16
Third amended original answer and cross-action of Midland County, Texas	339	45
Statement of Facts, May 18, 19 (excerpts)	252	50
Testimony of Clark Moreland—		
direct	252	50
redirect	351	84
Louis Osborne—		
direct	374	95
redirect	400	106
Alvey Bryant—		
cross	564	109
recross	601	124
Judgment entered September 11, 1964	345	130

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 14, 1967

	Original	Print
Opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, Clayton, J.	350	134
Proceedings in the Supreme Court of Texas	357	141
Opinion, Steakley, J.	357	141
Dissenting opinion, Smith, Clyde E., J.	370	151
Judgment	378	160
Petitioner's motion for rehearing	380	161
Order denying petitioner's motion for rehearing	384	163
Order allowing certiorari	385	164

[fol. 321]

IN THE DISTRICT COURT
OF MIDLAND COUNTY, TEXAS,
142ND JUDICIAL DISTRICT

No. 18,018

HANK AVERY, Plaintiff,

vs.

EDWARD N. GIDEON, et al., Defendants.

PLAINTIFF'S SIXTH AMENDED ORIGINAL PETITION—
Filed April 30, 1964

To the Said Honorable Court:

Now comes Hank Avery, hereinafter styled Plaintiff, complaining of the Commissioners' Court of Midland County, Texas, a body politic, comprised of Edward N. Gideon, Commissioner of Precinct No. 1, Alvery A. Bryant, Commissioner of Precinct No. 2, Clark Moreland, Commissioner of Precinct No. 3, Louis Osborne, Commissioner of Precinct No. 4, and Barbara G. Culver, County Judge, and of Midland County, Texas, one of the counties of the State of Texas and a body corporate and politic, hereinafter styled Defendants, and for cause of action respectfully shows unto the Court the following:

1.

Plaintiff is a resident of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas. He owns real and personal property in and is a taxpayer and qualified voter of such City, Precinct, County and State. Plaintiff brings this suit individually and on behalf of other persons similarly situated and qualified, they be-

ing so numerous as to make it impracticable to bring them all before this Court. Defendants Edward N. Gideon, Alvery A. Bryant, Clark Moreland, and Louis Osborne are, respectively, the duly elected and acting County Com- [fol. 322] missioners of County Commissioners' Precincts No. 1, No. 2, No. 3, and No. 4 of Midland County, Texas, and Defendant Barbara G. Culver is the duly elected and acting County Judge of Midland County, Texas. All of said Defendants are residents of Midland County, Texas. This suit is brought against each of said Defendants individually and as members constituting the Commissioners' Court and governing body of Midland County, Texas.

2.

Midland County was created by and organized under the provisions of Chapter 23, Acts of the Nineteenth Legislature of the State of Texas, Regular Session, 1885. The four County Commissioners' Precincts of said County were first established by the Commissioners' Court of said County by an Order passed and approved on February 9, 1886. The boundaries of Commissioners' Precincts No. 1 and No. 4 were thereafter changed by Order of the Commissioners' Court passed and approved on August 12, 1897. By Order of the Commissioners' Court passed and approved on February 16, 1898, the boundaries of all Commissioners' Precincts were reestablished and defined, the effect of such Order being to change the boundaries of Commissioners' Precincts No. 1, No. 3 and No. 4. The boundaries of Commissioners' Precincts No. 3 and No. 4, as established in the Order of 1898, were thereafter changed by Order of the Commissioners' Court passed and approved on July 1, 1908. The boundaries of said Commissioners' Precincts were not again changed until January 1, 1964, the effective date for a change in boundaries provided for in an Order of the Commissioners' Court passed and approved on August 31, 1963.

3.

At the time of its creation and organization and at the time of said Orders of 1897, 1898, and 1908, Midland [fol. 323] County was predominantly a rural area, consisting of ranch and waste land, and was sparsely populated, having a population ranging from approximately 1,000 people in 1885 to approximately 3,500 people in 1908. The City of Midland was first incorporated in 1901. Its corporate existence was abolished in 1911 and later in the same year it was again incorporated and it was then and has been at all times since the only incorporated city, town, or village in Midland County, Texas. From the date of such incorporation until 1949, the City of Midland was situated entirely within the boundaries of County Commissioner's Precinct No. 1 of Midland County, Texas. In such year, by annexing a narrow strip of land to the southwest, the City extended its boundaries into Commissioner's Precinct No. 4 for the purpose of annexing the City of Midland Air Terminal. However, at the time of such annexation and at all times since, all of that part of the City of Midland lying outside the boundaries of Commissioner's Precinct No. 1 has been devoted primarily to public and commercial use and has had a population of less than 300 people.

4.

During the first half of this Century, the predominant growth in population of Midland County occurred in County Commissioner's Precinct No. 1 and, more specifically, within the corporate limits of the City of Midland, as shown by the following Federal Decennial Census figures for the respective years indicated:

POPULATION

Year	County of Midland	City of Midland
1910	3,464	2,192 (63%)
1920	2,449	1,795 (73%)
1930	8,005	5,484 (69%)
1940	11,721	9,352 (80%)
1950	25,785	21,713 (84%)

[fol. 324] 5.

With the advent of the post-World War II building and economic boom, following the discovery of oil and the rapid development of commerce in Midland County, this population growth continued at an accelerated rate in the 1950's. Following the growth pattern of prior decades, virtually all of this increase in population was confined to the City of Midland and to County Commissioner's Precinct No. 1. During this period several requests were made of the Commissioners' Court of Midland County to redivide and redistrict the Commissioners' Precincts of the County for the convenience of the people thereof by effecting a more equal distribution of population, qualified voters, taxable values, land area, and other pertinent factors among the Commissioners' Precincts; however, the Commissioners' Court failed and refused to make any changes in the boundaries of such Precincts as established by the Order of 1898 and modified in part by the Order of 1908.

6.

By 1960, according to the Federal Decennial Census of that year, Midland County had a total population of 67,717 persons, of which number 62,625, or 92.48%, resided in the City of Midland, which, as stated before, was then and has been at all times since, situated virtually entirely within the boundaries of County Commissioner's Precinct No. 1 in said County. In such year, the total population of the County was distributed among the Commissioners' Precincts approximately as follows:

1960 Population

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
66,225	298	414	780
(97.80%)	(.44%)	(.61%)	(1.15%)

[fol. 325] In such year, Midland County had 19,780 qualified voters who were distributed among the Commissioners' Precincts as follows:

1960 QUALIFIED VOTERS

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
19,450	68	178	176
(97.88%)	(.34%)	(.90%)	(.88%)

In such year, other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of County funds and revenues, and others, were disproportionate among the Commissioners' Precincts of Midland County, all making the Commissioners' Precincts established in 1898 and modified in part by the Order of 1908, which remained unchanged and in effect, grossly impractical and inconvenient to the people.

7.

These facts, figures and things, alleged above, remained substantially the same in 1961 and 1962, yet the Commissioners' Court of Midland County continued to fail and refuse to redivide and redistrict the Commissioners' Precincts of such County for the convenience of the people. On the 24th day of September, 1962, Plaintiff appeared before the Commissioners' Court of Midland County with a petition and request, which he duly presented, for such Court to redivide, redistrict, and reapportion the Commissioners' Precincts of said County for the convenience of the people thereof and in so doing to provide a more equal distribution of population, qualified voters, taxable values, land area, and other pertinent things among such Precincts, thereby insuring to Plaintiff and others similarly situated their rights and guarantees under the Constitutions and laws of the United States of America and the State of Texas. Such petition and request was refused. Shortly [fol. 326] thereafter, Plaintiff brought this suit, invoking the jurisdiction of this Court under its supervisory control of County Commissioners' Courts, under the provisions of Article 5, Section 8 of the Constitution of the State of Texas, all as more fully shown by the pleadings and papers on file herein.

8.

During the pendency of this suit, to-wit: in July and August, 1963, but before trial was had on its merits, the Commissioners' Court of Midland County, Texas, composed of Defendants Gideon, Bryant, Moreland, Osborne, and Culver, purported to hold and conduct public hearings on the matter of redividing, redistricting, and reapportioning the County Commissioners' Precincts of said County. During the course of such hearings, Plaintiff and many others appeared before said Defendants and requested that the Orders of 1898 and 1908 and all prior Orders relating to the establishment of Commissioners' Precincts of said County be set aside, rescinded, and repealed and that such Defendants pass and approve a new Order of the Commissioners' Court dividing the County into four Commissioners' Precincts for the convenience of the people. At such hearing, Plaintiff presented to said Defendants a suggested plan or guideline for the division, redistricting and reapportionment of such County into Commissioners' Precincts. Such plan or guideline was in all things proper, practical, and for the convenience of the people. It was designed to divide the County into Commissioners' Precincts having a substantially equal number of people, qualified voters, square miles, miles of County roads, taxable values and other pertinent things, thereby serving the convenience of the people of Midland County and insuring to Plaintiff and others similarly situated and qualified their rights and guarantees under the Constitu-[fol. 327] tions and laws of the United States of America and of the State of Texas. Plaintiff's request was denied and his plan and guideline rejected.

9.

Thereafter, on the 31st day of August, 1963, the Defendants Gideon, Bryant, Moreland, Osborne, and Culver, or a majority thereof, constituting and acting as the members of the Commissioners' Court of Midland County, Texas, passed and approved an Order of said Commissioners' Court, dividing and redistricting Midland County into four

new County Commissioners' Precincts, the boundaries of said new Precincts to become effective on the 1st day of January, 1964. The Defendants Gideon, Bryant, Moreland, and Osborne voted in favor of the passage and approval of such Order; the Defendant Culver was present and presiding, but did not vote. Said Order made only insignificant changes in the boundaries of the old County Commissioners' Precincts, in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of County roads, and other pertinent things among the Commissioners' Precincts of the County. Said Order was and is impractical and inconvenient to the people of Midland County, and deprives Plaintiff and others similarly situated of their equal rights with other residents, qualified voters and taxpayers of Midland County, abridges their privileges and immunities as citizens, denies to them equal protection and due process of the law, and, in effect, deprives them of the right of franchise. Under the facts and circumstances and for the reasons hereinafter set forth, all of which were and are well known to Defendants, in passing and approving said Order on August 31, 1963, Defendants Gideon, [fol. 328] Bryant, Moreland, and Osborne acted arbitrarily, capriciously, unreasonably, unfairly, improperly, wrongfully, without regard for the convenience of the people of Midland County or the rights, privileges, and guarantees of Plaintiff and others similarly situated, and in gross abuse of their discretion.

10.

Immediately prior to the passage of said Order, Midland County had a population of approximately 70,000 persons distributed among the Commissioners' Precincts then in effect approximately as follows:

APPROXIMATE POPULATION, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
68,508	298	414	780
(97.87%)	(.43%)	(.59%)	(1.11%)

11.

At the time of the passage of said Order and at all times since, Midland County has had a population of approximately 70,000 persons, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE POPULATION, AFTER 8/31/63

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
67,906 (97.01%)	852 (1.22%)	414 (.59%)	828 (1.18%)

12.

Immediately prior to the passage of said Order, Midland County had 15,554 qualified voters, distributed among the Commissioners' Precincts then in effect as follows:

[fol. 329]

QUALIFIED VOTERS, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
15,238 (97.97%)	89 (.58%)	107 (.68%)	120 (.77%)

13.

From the time of the passage of said Order until the 1st day of February, 1964, Midland County had 15,554 qualified voters, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE NUMBER OF QUALIFIED VOTERS, AFTER 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
15,137 (97.32%)	188 (1.21%)	107 (.69%)	122 (.78%)

14.

On the 1st day of February, 1964 and at all times since, Midland County has had 25,609 qualified voters, distributed among the Commissioners' Precincts established by such Order as follows:

APPROXIMATE NUMBER OF QUALIFIED VOTERS, 2/1/1964 TO DATE

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
24,945	265	150	249
(97.40%)	(1.04%)	(.59%)	(.97%)

15.

Immediately prior to the passage of said Order, Midland County had a total land area of approximately 900 square miles, distributed among the Commissioners' Precincts then in effect approximately as follows:

APPROXIMATE LAND AREA IN SQUARE MILES, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
231	113	301	255
(26%)	(13%)	(33%)	(28%)

[fol. 330]

16.

At the time of the passage of said Order and at all times since, Midland County has had a total land area of approximately 900 square miles, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE LAND AREA IN SQUARE MILES, AFTER 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
110	172	313	305
(12%)	(19%)	(35%)	(34%)

17.

Immediately prior to the passage of said Order, Midland County had a total assessed valuation of taxable property of $111,480,550.00, distributed among the Commissioners' Precincts then in effect approximately as follows:

APPROXIMATE ASSESSED VALUATION, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
$71,347,552 (64%)	$13,377,660 (12%)	$13,377,660 (12%)	$13,377,660 (12%)

18.

At the time of the passage of said Order and at all times since, Midland County has had a total assessed valuation of taxable property of $111,405,970, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE ASSESSED VALUATIONS, AFTER 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
$67,957,641 (61%)	$14,482,776 (13%)	$14,482,776 (13%)	$14,482,776 (13%)

19.

At the time of the passage of said Order and at all times [fol. 331] since, many other things, such as miles of County roads, allocation of County funds and revenues, percentage of market value of taxable property assessed for taxation, and many others relating to the status, function, and operation of Midland County, were and are grossly disproportionate and unequal among the Commissioners' Precincts of said County.

20.

Under the division of Midland County into Commissioners' Precincts by the Order of 1898, as modified by the

Order of 1901, and by the Order of August 31, 1963, a majority of the Defendants, their predecessors and successors, were, are, and will continue to be elected by and answerable to less than 3% of the qualified voters of Midland County. As a result, and for the purpose of perpetuating themselves in office, the Defendants or a majority thereof, their predecessors and successors, acting as the Board of Equalization of Midland County, have and will continue to value for State and County tax purposes all taxable property in Commissioners' Precincts No. 2, No. 3, and No. 4 at an average of approximately 8% of its fair market value and all taxable property in Commissioner's Precinct No. 1 at an average of approximately 18% of its fair market value. Such arbitrary and unlawful action has and will continue to result from the abuse of discretion of Defendants in failing and refusing to divide Midland County into Commissioners' Precincts with each having as nearly as possible and practicable an equal number of people and qualified voters, all to the inconvenience of the vast majority of the people of Midland County and in deprivation and denial of Plaintiff's rights, privileges, and guarantees under the Constitutions and laws of the United States of America and the State of Texas.

[fol. 332] 21.

Article 5, Section 18 of the Constitution of Texas provides in part that each organized County in the State shall be divided from time to time, for the convenience of the people, into four Commissioners' Precincts and that such division shall be made by the Commissioners' Court of the County. Under the facts and circumstances and for the reasons herein set forth, the Order of the Commissioners' Court of Midland County on August 31, 1963, dividing said County into Commissioners' Precincts was not and is not practical, was not and is not convenient to the people of Midland County and, in passing and approving said Order the Defendants Gideon, Bryant, Moreland and Os-

borne acted arbitrarily, capriciously, unreasonably, unfairly, and wrongly and grossly abused their discretion.

22.

Plaintiff would further show unto the Court that the term "for the convenience of the people" contained in Article 5, Section 18 of the Constitution of the State of Texas, when construed with the provisions of said Article 5, Section 18 as a whole and with Article 1, Sections 1, 2, 3 and 19, of the Constitution of the State of Texas and the Fourteenth Amendment, Section 1, of the Constitution of the United States of America, requires that a County Commissioners' Court shall, as the occasion and facts demand, divide a County into Commissioners' Precincts having as nearly as possible and practicable an equal number of people and qualified voters. This the Order passed and approved by Defendants Gideon, Bryant, Moreland and Osborne on August 31, 1963, failed to do, though the occasion and facts demanded such a division and though same was in all things practicable and possible.

[fol. 333] 23.

Plaintiff would further show unto the Court that the Order of the Commissioners' Court of Midland County dividing said County into Commissioners' Precincts, passed and approved by Defendants Gideon, Bryant, Moreland and Osborne on August 13, 1963, deprives him and others similarly situated of their rights, liberties, privileges, and guarantees under the Constitutions and laws of the United States of America and of the State of Texas. Under the division made by said Order, the County Commissioners of Precincts No. 2, No. 3, and No. 4 will continue to be elected by less than 3% of the qualified voters of the County and said three Commissioners, constituting a majority of the Commissioners' Court, will continue to represent Commissioners' Precincts having a combined population of less than 3% of Midland County's total population,

while the County Commissioner of Precinct No. 1, the Precinct of Plaintiff's residence, will continue to be elected by more than 97% of the qualified voters of the County and will continue to represent a Commissioner's Precinct having more than 97% of Midland County's total population. Because great disparity in population and qualified voters among the Commissioners' Precincts exists and will continue to exist under said Order, Plaintiff is and will continue to be subjected to invidious and unjust discrimination; his voice as a citizen is and will continue to be diluted; and his vote as a qualified voter of Commissioner's Precinct No. 1, Midland County, Texas, is and will continue to be debased. For such reasons, said Order is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 3 and 19 of the Constitution of the State of Texas in that it abridges Plaintiff's privileges and im- [fol. 334] munities as a citizen, deprives him of due process of law, denies to him equal protection of the law, deprives him of equal rights with other citizens of Midland County and of privileges and immunities without due course of law.

24.

Plaintiff would further show unto the Court that under the provisions of Article 5, Section 8 of the Constitution of the State of Texas this Court has full power and authority to grant to Plaintiff the relief sought herein.

Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland

County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and [fol. 335] all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people, giving proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same

number of people, qualified voters, square miles, and other pertinent things.

(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining [fol. 336] the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election thereunder and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters.

(f) And for costs of suit and for such other relief, general or specially, in law or in equity, to which Plaintiff may show himself justly entitled.

Wm. A. Olson, Vinson, Elkins, Weems & Searls, Attorneys for Plaintiff, First City National Bank Building, Houston 2, Texas.

[fol. 337] *Duly sworn to by Hank Avery, jurat omitted in printing.*

Proof of Service (omitted in printing).

[fol. 338] [File endorsement omitted]

[fol. 179]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

142ND JUDICIAL DISTRICT

No. 18018

HANK AVERY,

v.

EDWARD N. GIDEON, et al.

FIFTH AMENDED ORIGINAL ANSWER OF ALVEY A. BRYANT, CLARK MORELAND AND LOUIS OSBORNE—Filed May 18, 1964

To the Honorable Judge of Said Court:

Pleas in Abatement and Motions to Dismiss

Now Come Alvey A. Bryant, Clark Moreland and Louis Osborne, defendants in the above styled and numbered cause, and in response to plaintiff's sixth amended original petition, separately and conjunctively repeat, renew, again

allege and incorporate by reference as if set out in full herein, each and all of the matters and statements contained in all of their motions to dismiss and pleas in abatement heretofore filed in this cause, and resubmit the same to the Court, and renew and preserve each and all of their exceptions to the rulings of the Court thereon.

Wherefore, defendants again pray that each of such motions to dismiss and pleas in abatement be in all things sustained.

Respectfully submitted,

Stubbeman, McRae, Sealy & Laughlin, By Frank Stubbeman, F. H. Pannill, W. B. Browder, Jr.

[fol. 180]
State of Texas)
County of Midland)

Before Me, the undersigned authority, on this day personally appeared F. H. Pannill, who, being by me first duly sworn, on oath deposes and says that he is one of the attorneys for the above named defendants in the above styled and numbered cause and that all of the matters and things alleged and set out in the pleas in abatement and motions to dismiss referred to above are in all things true and correct.

F. H. Pannill

Subscribed and Sworn to before me this 18th day of May, 1964.

Antoinette M. Welsh, Notary Public in and for Midland County, Texas.

Special Exception and Motion for Judgment

Now Come the above named defendants and specially except to plaintiff's petition and plaintiff's asserted cause of action because it is established by the allegations of plain-

tiff's petition and the record herein that plaintiff has no cause of action and judgment should be entered against him, for the following reasons:

1.

The record before the court is now as follows:

a. Plaintiff's sixth amended original petition.

b. True, correct and certified stenographic transcript of proceedings at redistricting hearings, which is attached to these defendants' Fourth Amended Original Answer on [fol. 181] file herein and referred to in Defendants' said answer and incorporated herein by reference.

c. Minutes of the defendant Commissioners Court of Midland County, Texas, of meeting of July 8, 1963, July 23, 1963, July 25, 1963, August 13, 1963 and August 27, 1963, showing motions, votes and deliberations on the matter of redistricting, which are, in fact, pleaded by plaintiff and attached hereto and here referred to by defendants.

d. Order entered on August 31, 1963, altering, changing and fixing the boundary lines of Commissioners Precincts in Midland County, Texas, which is pleaded by plaintiff and attached hereto as a part hereof.

Collectively, said records show that the plaintiff appeared before the Commissioners Court of Midland County, Texas, on or about September 24, 1962, and presented a written petition requesting that Midland County be divided into four equally populated county commissioners precincts; that plaintiff called no witnesses, offered no evidence, presented no plan and submitted no facts to show that such division was within the power and jurisdiction of the members of the Commissioners Court as being for the convenience of the people; and that the Commissioners Court then and on that day by a majority vote refused and denied plaintiff's petition and that on the same day this plaintiff filed his original petition in this cause.

3.

Said records further show that during July, 1963, after stating their intention so to do in open court in a pretrial hearing in this cause, the Commissioners Court of Midland County, Texas, by unanimous vote, called and ordered a series of public hearings on the question or issue of redistricting the commissioners' precincts. The records further show that such hearings were had at which a large number of citizens appeared pro and con on the issue of redistrict- [fol. 182] ing, and those favoring redistricting offered a variety of plans, proposals and requests to accomplish their respective aims. The records further show that thereafter the Commissioners Court in public and open session entered into a series of deliberations, debates and discussions on such matter, at the conclusion of which the Commissioners' Court by unanimous vote adopted and ordered a change and alteration in the commissioners' precinct districting, all as pleaded by plaintiff, and as set out in the answer of these defendants.

4.

Said records further show that this plaintiff has been accorded due process of law in all matters pertaining to his request for redistricting; that a full, fair and open public hearing has been held at which this plaintiff and all others interested were permitted every opportunity to express their views and present such evidence as they might deem material on the question before the court; and that the members of the court have diligently and conscientiously deliberated and considered all the facts, statements and requests made of them and have unanimously come to a conclusion as to a division of the county commissioners' precincts which is for the convenience of the people of the county. Therefore, said records show that there has been no infringement or denial of the rights of this plaintiff or anyone else.

5.

Said records also show that the matters submitted to the Commissioners Court in connection with such hearing were sharply divided and conflicting and controverted, and that the order and decision of the Commissioners Court is supported by substantial evidence. Defendants would, therefore, say that the supervisory and appellate jurisdiction of this court as to orders of the Commissioners Court is limited to determining whether such Commissioners Court [fol. 183] orders are supported by substantial evidence, and that if they are, it is the duty of this court to affirm and validate the same. The records show on their face that there is no genuine issue of material fact as to this matter, and that, as a matter of law, the order, judgment and decision of the Commissioners Court changing and defining the boundaries of the county commissioners' precincts is supported by substantial evidence and should not be disturbed by this Honorable District Court.

Premises Considered, defendants move the Court to enter judgment for defendants and against plaintiff on the pleadings and record now made and before the court.

Answer

Now Come the above named defendants, without waiving but still insisting upon each and all of their motions to dismiss and pleas in abatement and their Special Exception and Motion to Dismiss hereinabove filed, and, subject thereto, make this their answer to plaintiff's Sixth Amended Original Petition, and in support thereof show the court as follows:

I

Defendants specially except to all of the allegations of paragraphs 4, 5 and 6 of said petition and say the same are insufficient in law because such allegations consist solely of population statistics and voting statistics in Midland County, and various portions thereof, all of which are wholly irrelevant and immaterial to plaintiff's purported

cause of action for the reason that there is no duty on the Commissioners Court to divide the county into equally populated commissioners' precincts.

Of which special exception, defendants pray judgment of the court that each of said paragraphs be stricken from the petition.

[fol. 184]

II

Defendants specially except to the allegations of paragraphs 7 and 8 of said petition and say the same are insufficient in law because the same fail to allege any facts which show that the division of county commissioners' precincts is injurious or harmful or inconvenient to plaintiff or to any other person affected thereby and fail to state or show that plaintiff's purported plan or guideline for division of the county was or would be beneficial, helpful or convenient, or even desirable, to the people of Midland County, Texas. The allegations of said paragraphs constitute merely conclusions of the pleader, and expressions of the plaintiff's preferences, all of which are wholly immaterial to any issue in this cause.

Of which special exception, defendants pray judgment of the court ordering such paragraphs stricken.

III

Defendants specially except to paragraph 9 of said petition and say the same is insufficient in law because the same fails to state or show facts which impose on the County Commissioners any duty to divide the county into commissioners' precincts which are equal, or nearly equal, in population, qualified voters, land area, value of taxable property, miles of road or any other matters, the only duty of the Commissioners Court being to divide the county into commissioners' precincts which are convenient to the people, and thus said paragraph states merely conclusions of the pleader and the personal preferences of the plaintiff, all of which are wholly irrelevant and immaterial to this controversy.

IV

Defendants specially except to the allegations of paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of said petition and say the same are insufficient in law for the same reasons and on the same grounds as set out above in paragraph I of this answer.

[fol. 185] V

Defendants specially except to the allegations of paragraph 20 of said petition which complain of the methods of ad valorem taxation and valuation of properties in the county for such purposes, and say the same are insufficient and improper in law because the plaintiff fails to show that he has any standing in this Court to pursue on behalf of all residents of the county a taxpayer suit to review the method or system of ad valorem taxation in use in this county, because if such allegations remain in the petition the tax assessor-collector is a necessary and indispensable party to the suit, and because plaintiff has failed to show any financial or monetary loss personal or particular to him as a result of the alleged discrimination and wrongful imposition and handling of such taxation, all of which has been made the subject of prior special exception heretofore sustained by the Court and here renewed.

Of which special exception, defendants pray judgment of the Court ordering such allegations and said paragraph stricken from the petition.

VI

Defendants specially except to the allegations of paragraph 22 of said petition that the Constitutions of the United States and Texas require the county to be divided into precincts of an equal number of people and qualified voters, and say the same is insufficient and improper in law because the provisions of the Constitution of Texas and the Constitution of the United States referred to therein do not require that quasi judicial and administrative officials such

as county commissioners be elected from areas which are equal in population or voter strength, all of which has been made the subject of a prior special exception which has been sustained by the court and which is here repeated and renewed.

[fol. 186]

VII

Defendants specially except to the allegations of paragraph 23 of said petition and say the same is insufficient in law for the same reasons and on the same grounds as set out in the foregoing paragraph VI of this answer.

VIII

Defendants specially except to the allegations of paragraphs 7, 8, 22 and 23 of said petition which refer to the Fourteenth Amendment of the Constitution of the United States of America, and say that each and all of said allegations are insufficient and improper in law because the subdivision of Midland County into commissioners' precincts is not affected, controlled or governed by said Fourteenth Amendment to the United States Constitution, in that said amendment to said Constitution does not require that Midland County be divided into commissioners' precincts of numerical equality or substantial numerical equality or nearly substantial numerical equality, all of which has been made the subject of the prior special exceptions which have been sustained by the court and which are here repeated and renewed.

Of which special exception defendants pray judgment of the court ordering each of those allegations of said Fourteenth Amendment of the Constitution of the United States appearing in said paragraphs 7, 8, 22 and 23 be stricken from the petition.

IX

Defendants specially except to paragraph 24 of said petition and the prayer for relief therein stated, and say that:

(1) As to subparagraphs (a) and (b), the same request relief which is moot, hypothetical and not justiciable because plaintiff's petition shows on its face that the defendants have already complied with the order here requested and have divided the county into [fol. 187] commissioners' precincts for the convenience of the people;

(2) That as to subparagraph (c), plaintiff's petition shows on its face that this court has no jurisdiction to revise or amend the Constitution of the State of Texas by imposing conditions on the exercise of discretion by these defendants other than those stated in the Constitution, and it has no jurisdiction to prescribe or direct the factors, and the relative weight to be given to the factors, entering into such exercise of discretion;

(3) As to subparagraph (d), plaintiff's petition shows on its face that the same is moot, hypothetical, and not justiciable, because the order of which plaintiff complains was entered on August 31, 1963, to become effective January 1, 1964, and has become effective and elections have been called, voters have been registered, candidates have announced for office and been nominated for office in primary elections subject to such order; and

(4) That as to subparagraph (e), the request for relief made is beyond the jurisdiction of this court for the reasons heretofore set out in this paragraph.

X

Further answering, defendants deny each and every, all and singular, the allegations of plaintiff's petition and demand strict proof of the same.

[fol. 188]

XI

Further answering, defendants say that the order and decision entered by the Commissioners' Court of Midland

County, Texas, on August 31, 1963, was the result of public hearings at which a full and adequate opportunity to be heard was given to plaintiff and all others who appeared, and that such decision was reached after due deliberation based on a record which shows that there is substantial evidence to support such order, and that this plaintiff has no right or standing in this court to require or request that there be set aside an order which is supported by substantial evidence.

XII

Further answering, defendants say that plaintiff's claim for relief is hypothetical and not justiciable, being a political question committed by the Constitution to the discretion of the Commissioners Courts, validly and conscientiously exercised, and that plaintiff's petition shows on its face that such discretion has been validly and conscientiously exercised, and that plaintiff's claim for relief should be denied.

XIII

Further answering, defendants say that not until long after said order of August 31, 1963, has been passed and published, and had been put into effect, and elections called. voters registered and candidates announced and nominated for office under such order, did plaintiff take any steps to have the same reviewed, adjudicated or set aside by this District Court, and that, under such circumstances, plaintiff's time for a direct attack has long since passed and he is estopped to assert the same, and that therefore plaintiff's present petition constitutes a collateral attack on a valid and subsisting and effectuated order of the Commissioners Court of Midland County, Texas, in a proceeding in rem of [fol. 189] which it has jurisdiction, and such collateral attack is barred and prohibited by the doctrines of res judicata and estoppel by judgment, as well as by the law of laches and stale demand.

Wherefore, defendants pray that plaintiff take nothing by his suit and that these defendants go hence with their costs.

Respectfully submitted,

Stubbeman, McRae, Sealy & Laughlin, By Frank Stubbeman, F. H. Pannill, W. B. Browder, Jr., P. O. Box 670, Midland, Texas, Attorneys for Defendants Alvey A. Bryant, Clark Moreland and Louis Osborne.

[fol. 190]

EXHIBIT D2

BE IT REMEMBERED THAT ON THIS 8TH DAY OF JULY A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A REGULAR SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Precinct No. 1
ALVEY A. BRYANT, Commissioner, Precinct No. 2
CLARK MORELAND, Commissioner, Precinct No. 3
LOUIS OSBORNE, Commissioner, Precinct No. 4
ROSENELLE CHERRY, County Clerk

Motion by Commissioner Bryant, seconded by Commissioner Gideon, and all voting in favor to adopt the following resolution:

It is believed that open hearings should be conducted to determine whether the present Commissioners' precincts are for the convenience of the people as required by the Texas Constitution, or whether other Commissioners' precincts for the convenience of the people should be prescribed by this Commissioners' Court. This situation is presented in view of the fact that Mr. Hank Avery, Mayor of the City of Midland, has heretofore filed a suit in the District Court of this County to compel a redistricting of the County according to population; the Commissioners from Precincts

2, 3 and 4 have their own attorneys in this case, and their attorneys have presented to the District Court (a) a plea that Midland County is a necessary party to the case, and such plea has been sustained, (b) Special Exceptions to delete claims of discrimination in tax valuation, and these Exceptions have been sustained, (c) An Answer in opposition to Mayor Avery's Motion for Summary Judgment, and it has been sustained, and (d) Special Exceptions that the claim of the Mayor of a Republican form of government should be deleted, and this has been sustained; and (e) Special Exceptions that the Fourteenth Amendment of the United States Constitution does not require the County to be divided according to population, and this has been sustained. Further, the Attorneys for the Commissioners of Precincts 2, 3 and 4 have also presented a Motion for Partial Summary Judgment that the redistricting requests [fol. 191] heretofore made are too vague and general to require this Court to entertain such requests, but the District Judge has refused to sustain this Motion, so that the Attorneys stated to the District Judge in open Court that if the Motion were refused they would advise the members of the Commissioners' Court that they should consider any objections to the present districting or request for a redistricting.

In view of these rulings and decisions of the District Court, this Commissioners' Court understands that the only matter which it is to consider is whether the present Commissioners' precincts are for the convenience of the people and whether other proposed precincts would be for the convenience of the people; therefore,

BE IT RESOLVED by the Commissioners' Court of Midland County, Texas, that a special meeting of the Commissioners' Court be called for Tuesday, July 23, 1963, commencing at 10:00 o'clock A.M., at which time the Commissioners' Court will hear the evidence of Mayor Hank Avery and all others who care to attend as to any inconvenience to the people resulting from the present Commissioners' precincts, with such hearing to continue and be recessed

from day to day until all such evidence offered has been received and heard;

BE IT FURTHER RESOLVED that a special meeting of the Commissioners' Court be scheduled for Tuesday, August 13, 1963, commencing at 10:00 o'clock A.M., at which time the Commissioners' Court will hear the evidence of any person opposing a redistricting of Midland County, such hearing to be continued and recessed from day to day until all of that evidence has been heard and considered by the Court and

BE IT FURTHER RESOLVED that the Commissioners' Court reserve to a later time but before October 22, 1963 if possible, a decision as to when to vote on whether there is to be a redistricting of Midland County and to vote on the plan for redistricting if it is decided to change any of the present precinct boundaries.

This resolution to be entered in full in the Minutes of this Court.

THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of a Motion at a regular session of the Honorable Commis- [fol. 192] sioners' Court as recorded in Volume 8, Page 229, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT,
MIDLAND COUNTY, TEXAS
BY: IRENE MORRIS, Deputy

[fol. 193]

BE IT REMEMBERED THAT ON THIS THE 23RD DAY OF JULY, A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Precinct No. 1
ALVEY A. BRYANT, Commissioner, Precinct No. 2
CLARK MORELAND, Commissioner, Precinct No. 3
LOUIS OSBORNE, Commissioner, Precinct No. 4
ROSENELLE CHERRY, County Clerk

9:30 A.M.

In the County Judge's office and in the absence of an official call for a commissioners' Court meeting and not at a public place Commissioner Bryant presented the following Rules of Procedure for consideration of the court for the Public Hearing on Re-Districting of Midland County. Said Rules being as follows:

RULES OF PROCEDURE FOR HEARING IN COMMISSIONERS COURT

1. The Texas Rules of Civil Procedure will apply to proceeding where applicable.

2. No cameras or recording devices will be permitted in the hearing room while hearings are in progress.

3. No applause or other demonstrations from spectators or persons in the hearing room will be permitted.

4. Each person desiring to present any testimony shall be sworn and shall speak for himself or herself and not purport to speak for members of any organization. This shall not preclude any person from having a statement made or presented to the Court through an attorney.

5. Each attorney in the redistricting case pending in the District Court shall be permitted to question each person who appears to give testimony.

6. The order of the proceedings, including rulings on questions and evidence, shall be made by the County Judge but in case of exclusion of any evidence or testimony, the party offering the same may appeal to the entire Court for a ruling on admissibility.

7. Each person appearing shall have his or her attention directed to the order and ruling of the District Court that the Commissioners' Court is not under any duty to divide the county on a basis of equal population. County Judge [fol. 194] Culver read over the rules and stated "I will have no part in this attempt to hamstring the public hearings. I am the presiding officer of this court, prepared to preside over the public hearings, which have been called this morning. I do not want to be bound by these proposed rules which are designed to defeat the purpose of the meetings." Judge Culver then went to the County Courtroom in compliance with the call for the public hearings adopted by the Commissioners' Court.

9:55 A.M.

All Commissioners convened in the Commissioners' Court room and notified Judge Culver they were meeting. Judge Culver declined to attend due to Public Hearing scheduled for 10:00 A.M. in the County Courtroom. Commissioner Osborne was appointed Judge Pro Tem. Motion was made by Commissioner Moreland seconded by Commissioner Bryant to recess for one hour to determine if the County Judge or the majority of the Commissioners' Court would rule.

10:00 A.M.

Judge Culver proceeded to hold the Public Hearing in the County Court room on re-districting of Midland County. Commissioners Bryant, Moreland and Osborne were absent and Commissioner Gideon was present for the public hearing.

The following people were heard, favoring re-districting of Midland County: H. C. Avery, Mrs. Darol Ramey, Tom

Culbertson, Bob Young, Mrs. Virginia Kimmey, Warren Chapman, Wm. A. Heck, K. C. Slough, Grady White, H. Edward Lindsley, Mrs. J. H. Walters, W. A. Waldschmidt, Ray Herndon and Kamilla H. Key. Various plans were presented by these people and they are on file in the County Judge's Office. This meeting was recessed until 1:30 on July 23, 1963.

11:00 A.M.

Commissioner Moreland went to the County Courtroom and stated to Judge Culver "I request and move a meeting be had in the Commissioners' Court room with just the court members present to work out rules of procedure as I have previously told you I am against hearings where cameras and T.V.s and demonstrations from the crowd prevent an impartial hearing and exercise of discretion. This motion was seconded by Commissioner Bryant and [fol. 195] Commissioner Osborne voted in favor.

1:00 P.M.

The Commissioners' Court convened in the Commissioners' Court room with all members present. After much discussion Motion was made by Commissioner Bryant, seconded by Commissioner Moreland to adopt the following Rules of Procedure for the Public hearing on re-districting of Midland County. Said rules being as follows:

RULES OF PROCEDURE FOR PUBLIC HEARING IN COUNTY COMMISSIONERS COURT ADOPTED JULY 23, 1963

1. No applause or other demonstrations or straw votes will be permitted from spectators or persons in the hearing room.

2. Each person desiring to present any testimony shall be sworn if he chooses to be sworn. Any person who has been sworn will be given the option of being cross-examined by the attorneys. Persons wishing to make a statement

or ask a question will be heard whether or not they elect to be sworn.

3. One attorney for each side in the redistricting case pending in the District Court shall be permitted to question each person who has been sworn and who agrees to submit to cross-examination.

Commissioner Osborne voted aye and Commissioner Gideon voted Nay.

1:30 P.M.

The public hearing on Re-districting Midland County reconvened at 1:30 in the County Courtroom with the entire Commissioners Court present. It was agreed that proceedings held in the morning would be made part of the record and each person given an opportunity to present his views again. After hearing the same people that were heard in the morning this hearing was adjourned until July 25, 1963 at 1:30 P.M.

3:00 P.M.

The Public Hearing on Re-Districting of Midland County re-convened at 1:30 P.M. on July 25, 1963 in the County Court room. The following people were heard: H. C. Avery Jr., Mrs. C. M. Linehan, Wm. L. Adam, Paul E. Fitz-
[fol. 196] gerald, Mrs. W. W. Crofton, Mrs. Elizabeth Leggett, L. A. Kuykendall and Joe C. Davis. The meeting was recessed until 10:00 A.M. on July 31, 1963.

The Public Hearing on Re-Districting of Midland County re-convened at 10:00 A.M. on July 31, 1963 in the County Court room with all members of the Commissioners' Court present. The following people were heard in favor of redistricting: L. A. Kuykendall, Tom Barnes, Louis H. Anderson, Bruce Vernor, William A. Heck and H. C. Avery Jr. The meeting was adjourned.

[fol. 197]
THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a portion of the minutes of a SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 232A, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

[fol. 198]
THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas do hereby certify that the above and foregoing is a full, true and correct copy of MINUTES of the Honorable Commissioners' Court as recorded in Volume 8, Page 235, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

[fol. 199]

BE IT REMEMBERED THAT ON THIS THE 13TH DAY OF AUGUST A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS, A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY A. BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

A public hearing was held in the District Courtroom on Re-districting of Midland County with the following people speaking against the re-districting: Frank Bezoni, Rev. Ross Payne, Ben Golladay, N. J. Bell, Eugene Jones, Harry Coleman, Roy Parks, Murray Fasken, N. A. Bergstrom, T. C. Tubb, P. F. Bridgewater, Foy Proctor, George Glass, Marion Flynt, Bob Preston, Gale Pugh, Kenneth Parker, Louis Bartha, Clarence Scharbauer and Henry Brunson.

Motion by Commissioner Bryant, seconded by Commissioner Moreland, and all voting in favor to adjourn the public hearing on re-districting.

ATTEST /s/ ROSENELLE CHERRY, County Clerk

/s/ BARBARA G. CULVER, County Judge

THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the Minutes at a SPECIAL SESSION of the HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 241 of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

BE IT REMEMBERED THAT ON THIS THE 27TH DAY OF AUGUST A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY A. BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

Motion by Commissioner Gideon to adopt his plan as submitted in regular meeting on August 26, 1963 for re-districting Commissioners' Precincts in Midland County. This motion died for the lack of a second. Said plan being as follows:

AT 10:00 A.M.

BE IT REMEMBERED THAT ON THIS THE 31ST DAY OF AUGUST A.D. 1963/THERE CAME ON TO BE HELD IN THE COURTHOUSE MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT, THOSE PRESENT BEING:

ALVEY BRYANT, JUDGE PRO TEM
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

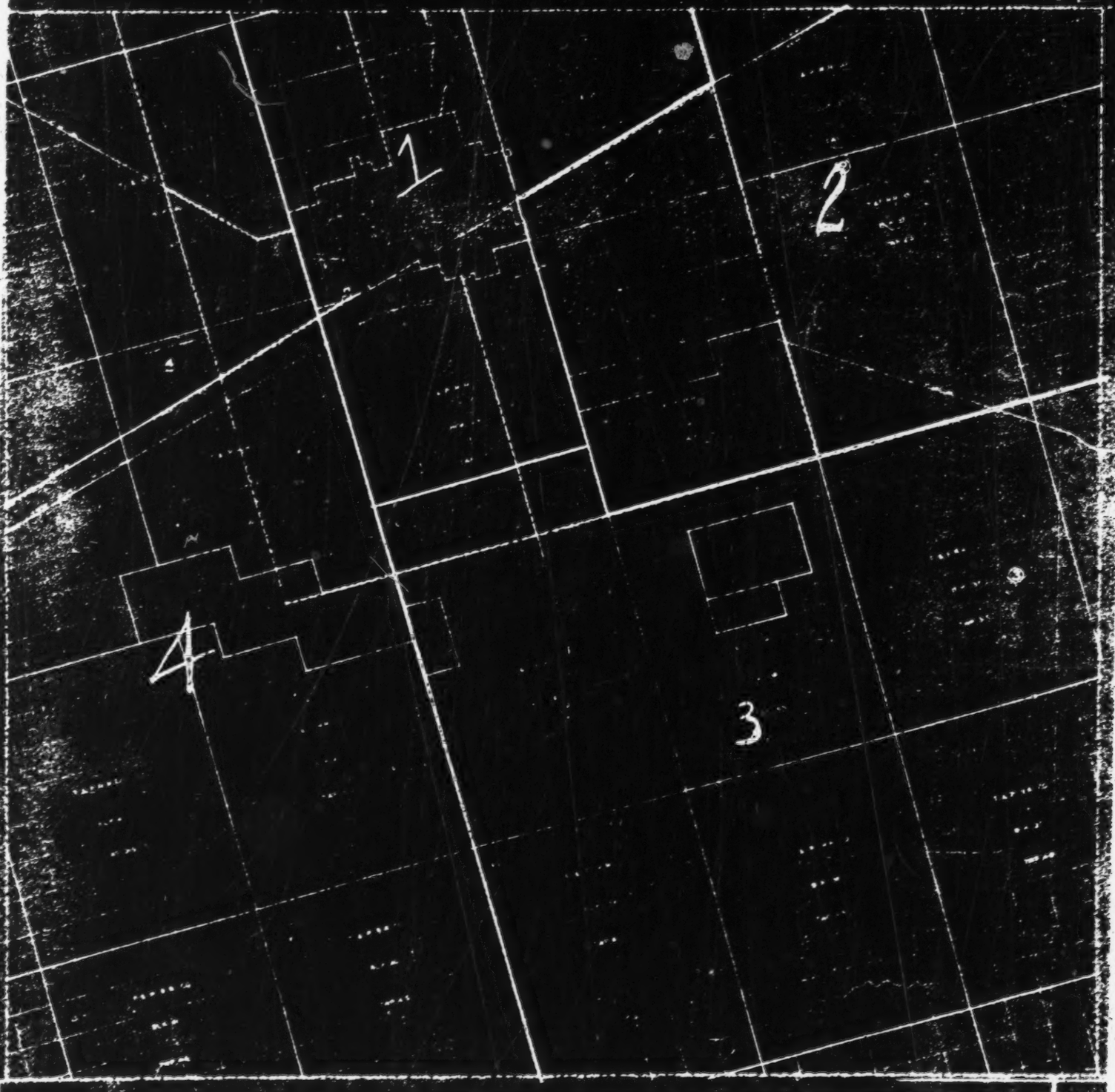
Due to the absence of Judge Culver and Commissioner Gideon, Motion was made by Commissioner Moreland, seconded by Commissioner Osborne, and all voting in favor to adjourn until 2:30 PM and hope Judge Culver and Commissioner Gideon would be able to attend the meeting.

Judge Pro Tem

The Commissioners' Court reconvened with the following members present:

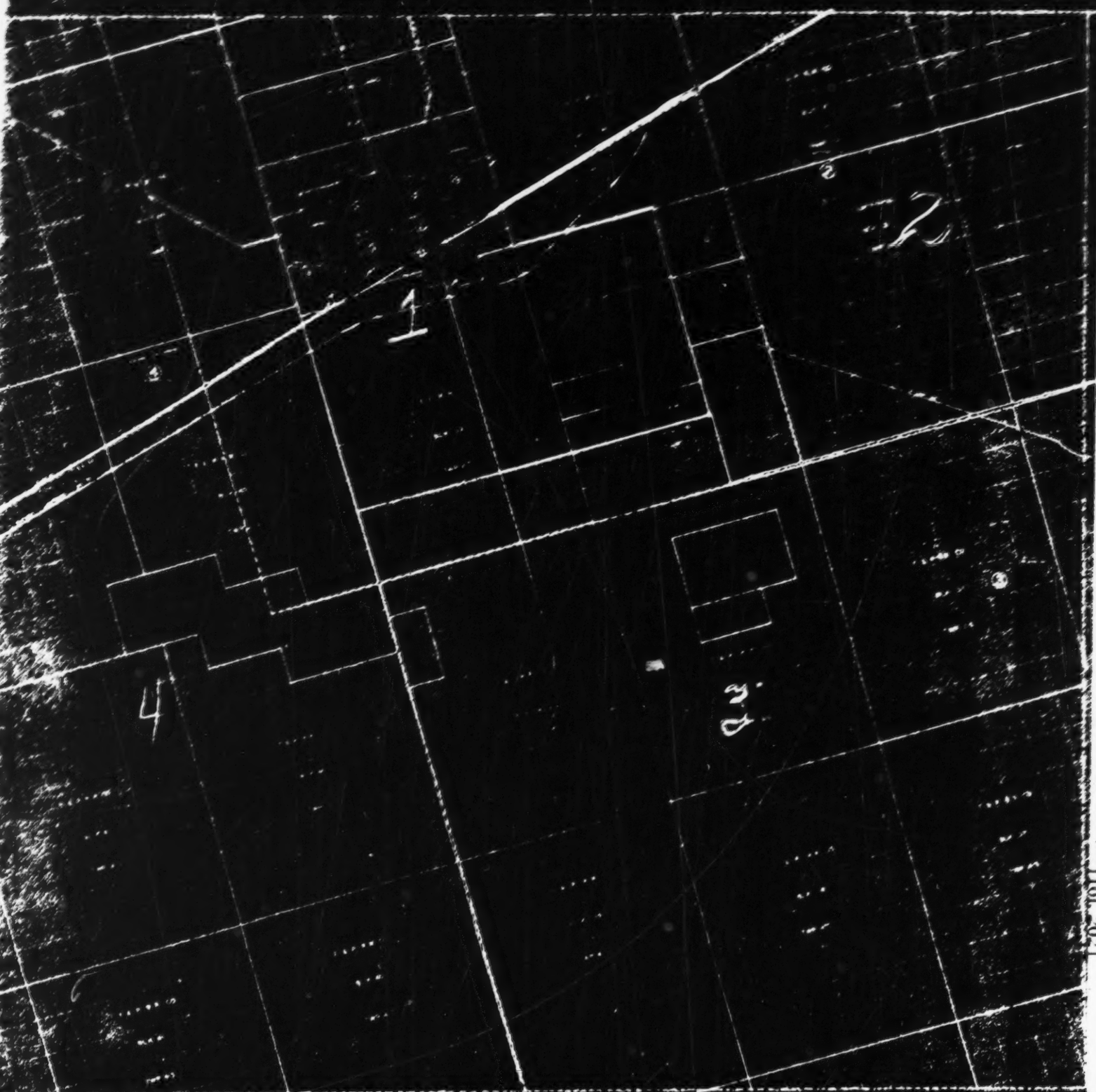
BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

Commissioner Osborne submitted the following plan for re-districting Commissioners Precincts in Midland County.



[fol. 201]

Motion by Commissioner Bryant to adopt his plan for re-districting the Commissioners Precincts in Wise County as previously submitted at a special meeting held on August 6, 1964. Said motion died for the lack of a second, said plan being as follows:



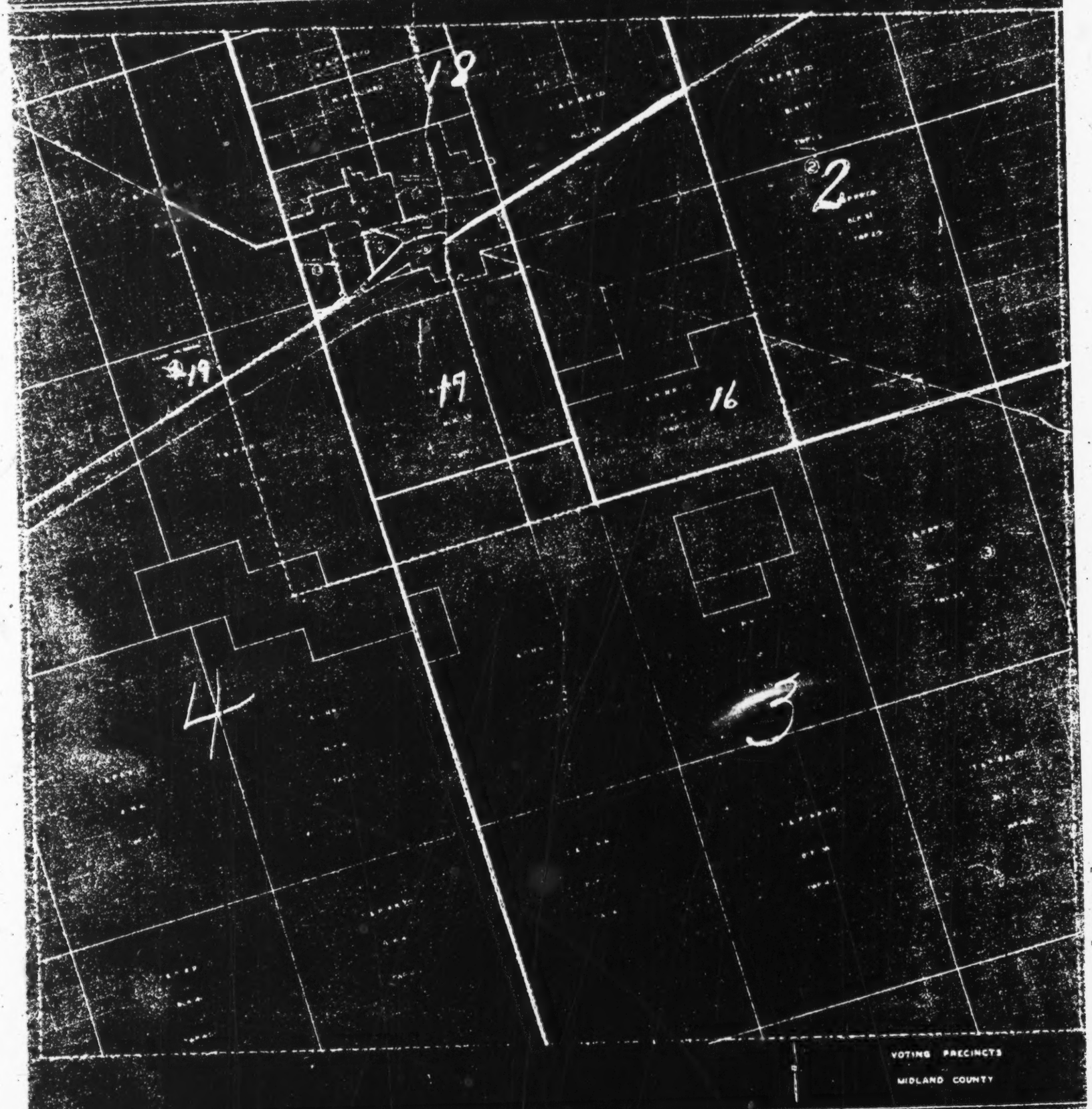
Commissioners Moreland and Osborne presented their plans to leave the Commissioners Precincts as they are presently established.

Judge Culver approved the plan of Commissioner Gideon and urged the Commissioners' Court to adopt it.

Motion by Commissioner Moreland, seconded by Commissioner Osborne to leave the County Commissioners' Precinct lines as they presently are until a further study could be made of them. Commissioner Bryant voted aye and Commissioner Gideon voted Nay.

All residents outside the City Limits of Terminal and in Commissioners Precinct No. 4 shall be in ... Precinct No. 4.

All boundaries of Commissioners Precincts and Voting Precincts shall become effective January 1, 1964.



There being no further business to come before the court the meeting was adjourned after the foregoing minutes were read and approved.

ATTEST: _____ County Clerk

_____ County Judge

[Vol. 20]

[fol. 204]

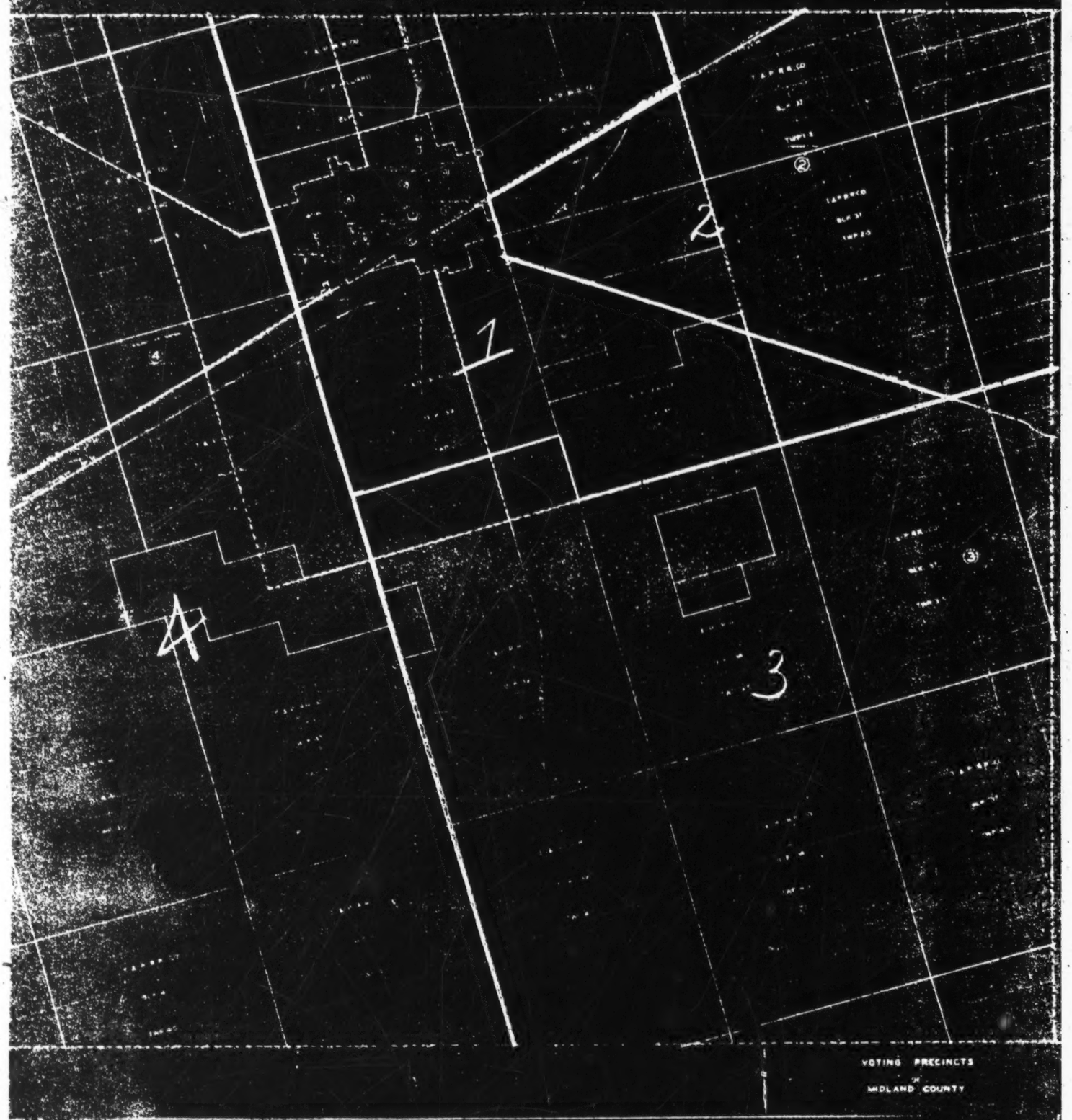
THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the minutes of a SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 246, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

Commissioner Bryant submitted his plan for re-districting Commissioners Precincts in Midland County. Said plan being as follows:



After discussing both plans presented, Motion was made by Commissioner Osborne, seconded by Commissioner Moreland and all Commissioners voting in favor to adopt the plan presented by Commissioner Osborne on re-districting Commissioners precincts in Midland County. A map of this plan appears on page 246 of these minutes.

After changing the Commissioners Precinct boundary lines it was necessary to amend the voting precincts for 1964. Motion was made by Commissioner Gideon, seconded by Commissioner Bryant, and all voting in favor to amend these voting precincts as follows:

All residents South of the Garden City highway, in Commissioners Precinct No. 2 shall be in voting precinct No. 16.

All residents North of the Garden City Highway and in Commissioners Precinct No. 2 shall be in voting precinct No. 2.

All residents South of the railroad track, outside the City Limits and in Commissioners Precinct No. 1 shall be in Voting Precinct No. 17.

All residents North of the Railroad track, outside the City Limits and in Commissioners Precinct No. 1 shall be in Voting Precinct No. 18.

All residents within the City Limits of Terminal and in Commissioners Precinct No. 4 will be in Voting Precinct No. 19.

[fol. 207] There being no further business to come before the court the meeting was adjourned after the foregoing minutes were read and approved.

ATTEST /s/ ROSENELLE CHERRY, County Clerk
/s/ BARBARA G. CULVER, County Judge

THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the minutes of A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 243, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
By: /s/ IRENE MORRIS, Deputy

[fol. 208] [File endorsement omitted]

[fol. 339]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS
142ND JUDICIAL DISTRICT
No. 18,018

HANK AVERY, Plaintiff,

vs.

EDWARD N. GIDEON, MIDLAND COUNTY COMMISSIONER OF PRECINCT No. 1, et al., Defendants.

THIRD AMENDED ORIGINAL ANSWER AND CROSS-ACTION OF MIDLAND COUNTY, TEXAS—Filed May 18, 1964

To the Honorable Judge of Said Court:

Now comes Midland County, Texas, appearing herein by and through its duly authorized, elected, qualified and

acting County Attorney, and files this its Third Amended Original Answer in the above styled and numbered cause, and would show the Court as follows:

I.

Midland County denies the allegations of paragraph 22 of Plaintiff's Sixth Amended Original Petition to the effect that Article V, Section 18, Constitution of Texas, means and must be construed as requiring that Midland County must be divided into Commissioners precincts having substantial numerical equality in population.

II.

Midland County denies the allegations of paragraphs 9, 20, 22, and 23 of Plaintiff's Sixth Amended Original Petition and any and all other paragraphs of said petition that directly or indirectly allege that Midland County, as it is presently created and organized, violates Amendment 14, Section 1 of the Constitution of the United States of America and Article 1, Sections 1, 2, 3 and 19 of the Constitution of the State of Texas; in this respect Midland County specially excepts to any and all of said paragraphs and asks that they be stricken from Plaintiff's pleadings for the reason that the Court, in this cause, has already ruled that the creation and organization of Midland County does not violate said constitutional provisions.

[fol. 340] III.

Midland County cannot either admit or deny the Plaintiff's allegations of abuse of discretion of any of the other defendants, but demands strict proof thereof, and, as to all other matters herein, Midland County denies each and every, all and singular, the other allegations contained in Plaintiff's Sixth Amended Original Petition, and of this, puts itself upon the country.

Wherefore, Midland County prays that Plaintiff take nothing as to it and that no costs be adjudged against it.

Cross-Action

Now comes Midland County, Texas, hereinafter sometimes called "Cross-Plaintiff", complaining of Hank Avery, hereinafter sometimes called "Cross-Defendant", and by way of Cross-Action would show the Court the following:

I.

Midland County is a legal subdivision of the State of Texas, and a body corporate, duly organized and existing under and pursuant to the Constitution and laws of the State of Texas, and appears herein by and through its duly authorized, elected, qualified and acting County Attorney, and by virtue of an order and resolution duly passed by its Commissioners Court.

II.

The only interest of Midland County in this controversy is to have judicially declared, determined and established as follows:

(1) That it is duly and lawfully created and organized pursuant to valid and subsisting provisions of the Constitution and laws of the State of Texas,

(2) That the officers and officials who serve in their various capacities in Midland County are authorized to serve as such by virtue of the political framework of a duly and lawfully created and organized County of the State of Texas, and

(3) That all acts performed by said officers and officials within the scope of their respective authorities are official [fol. 341] acts of their respective lawful offices.

Due to changes made in the Election Code for 1964 the election voting precincts estab[illegible] meeting held on August 12, 1963 will have to be amended to comply with the 1964 Election Code.

Motion by Commissioner Bryant, seconded by Commissioner Gideon, and all voting in favor that Vo[illegible]s 1, 2, 3, 8, 10, 11, 13, 14, and 15 shall end at the City Limits and the following new voting precincts [illegible] organized:

All residents South of the Railroad track, East of South Big Spring (Rankin Hwy.), outside the City Limits, and in Commissioners Precinct 1 will be in Voting Precinct No. 16.

All residents South of the Railroad track, West of South Big Spring (Rankin Hwy.), outside the City Limits, and in Commissioners Precinct No. 1 will be in Voting Precinct No. 17.

All residents North of the Railroad track, outside the City Limits and in Commissioners Precinct No. 1 will be in Voting Precinct No. 18.

All residents within the City Limits of Terminal and in Commissioners Precinct No. 4 will be in Voting Precinct No. 19.

[Vol. 206]

III.

A dispute and controversy has arisen between Midland County and Hank Avery in that the latter asserts, contends and alleges that the Constitution of the State of Texas requires that Midland County be divided into four Commissioners precincts having numerical equality in population, and that such division has not been made; a further dispute and controversy exists in that Hank Avery also claims, contends and alleges that the section of the Texas Constitution and the statutes and orders under which Midland County was created and organized are void and in conflict with certain provisions of the United States Constitution.

IV.

The existence of this dispute and controversy materially affects the rights and interests of Midland County, Texas by casting doubt and uncertainty on the validity of its origin and creation and, consequently, on the legal authority of its officials to act, thereby amounting to a controversy which is sufficient to invoke the jurisdiction of this Court under the Texas Declaratory Judgment Act.

V.

Midland County says that in truth and in fact the Constitution of the State of Texas does not require that Midland County be divided into four precincts of substantial numerical equality in population, and the omission of that requirement in the Act of the Legislature creating Midland County and the failure to comply with that requirement in the original and subsequent orders establishing precinct boundaries do not render invalid, illegal or void the creation and/or organization of Midland County, Texas. Further, Cross-Plaintiff says that the provisions of the Texas Constitution under which Midland County was created and organized are not violative of, or in conflict with, any provision of the Constitution of the United

States, and the Act of the Texas Legislature creating and [fol. 342] organizing Midland County and the several orders fixing and establishing Commissioners precincts are valid, subsisting, legal enactments and orders.

Wherefore, Midland County prays that on hearing hereof, it have and recover of and from Hank Avery and all persons belonging to the class of persons whom he represents, or acting in concert with him, a declaratory judgment decreeing, declaring and establishing the following:

(1) That the Constitution of the State of Texas does not require that Midland County be divided into four precincts of substantial numerical equality in population,

(2) That Midland County is a valid, legal, existing subdivision of the State of Texas, and

(3) That all provisions of the Texas Constitution, laws and orders under which Midland County has been created and organized are valid, subsisting and constitutional under the provisions of the Constitution of the United States of America,

Midland County further prays that it have costs of suit and for such other relief, general or special, in law or in equity, to which it may show itself justly entitled.

Harrell Moore, County Attorney, Midland County, Texas, Attorney for Defendant Midland County, Texas.

[fol. 343] *Duly sworn to by Harrell Moore, jurat omitted in printing.*

[fol. 344] [File endorsement omitted]

[fol. 252]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

March Term, A.D. 1964

No. 18018

HANK AVERY, Plaintiff,

vs.

EDWARD N. GIDEON et al., Defendants.

STATEMENT OF FACTS—May 18, 19, 1964

CLARK MORELAND, called by plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Olson:

Q. Your name is Clark Moreland. Is that correct?
A. Yes, sir.
Q. And, Mr. Moreland, where do you reside?
A. I reside at Route 1, Box 66, which is 10 miles south of Midland.
Q. In Midland County?
A. Yes, sir.
Q. And how long have you resided in Midland County?
A. Little over 20 years.
Q. And how old a man are you, Mr. Moreland?
A. Thirty-five.
Q. Now, Mr. Moreland, what is your educational background, please, sir?
A. High school.
Q. Did you graduate from high school here in the city of Midland?
A. Yes, sir.

Q. And what year did you graduate?

A. 1947.

[fol. 253] Q. Now you state that you live at Route 1, Box 66, Midland, which is about 10 miles south of the city of Midland.

A. Yes, sir.

Q. Now if you live about 10 miles south of the city of Midland, what commissioners precinct do you live in?

A. No. 3.

Q. Now, I believe that you are a member of the commissioners court of Midland County.

A. Yes, sir, I am.

Q. And you are the member of the commissioners court that represents Precinct No. 3.

A. Yes, sir.

Q. How long have you been on the court?

A. Since January 2, 1961.

Q. Did you run this year?

A. Yes, sir.

Q. Did you have an opponent?

A. No, sir.

Q. How many votes did you get?

A. Me?

Q. Yes.

A. About 92, I believe.

Q. Ninety-two votes.

A. Yes, sir.

[fol. 254] Q. Were those the total votes that were cast in Precinct 3?

A. No, it was around 98, I believe.

Q. Ninety-eight votes that were cast in Precinct No. 3. Now in addition to your serving, representing Precinct No. 3, you also have an elected commissioner representing Precincts 1, 2, and 4. Now who represents Precinct No. 1?

A. Mr. Ed Gideon.

Q. And is he in the courtroom?

A. Yes, sir.

Q. And who represents Precinct No. 2?

A. Mr. Alvey Bryant.

Q. Is he in the courtroom?

A. I don't believe he is here at this time.

Q. And who represents Precinct No. 4?

A. Mr. Louis Osborne.

Q. And those are all of the elected commissioners from Midland County?

A. Yes, sir.

Q. In addition to that are there any other members of the commissioners court in addition to you four?

A. The county judge.

Q. And the five of you make up the commissioners court of Midland County.

[fol. 255] A. That is right, sir.

Q. Now, Mr. Moreland, you have been in the courtroom during the course of this week that we have been trying this case.

A. Yes, sir.

Q. And you have heard the many exhibits presented and the testimony given from the witness chair. That is correct, isn't it?

A. That is right.

Q. Have you heard the objections made by counsel and the efforts that have been made to establish the population density of Midland County? That is correct, isn't it?

A. Yes, sir.

Q. Now, Mr. Moreland, you say that you have lived in this county for 20 years.

A. Yes, sir.

Q. Now has most of that 20 years been in Precinct 3 or have you lived in the city of Midland part of the time?

A. Been in Precinct 3 all the time.

Q. During the whole 20 years?

A. Yes, sir.

Q. You have lived there. Now, Mr. Moreland, I am sure as a member of this commissioners court and, of course, you

recognize the fact that as a member of the commissioners court you represent all of the people living in the county. [fol. 256] That is right, isn't it?

A. Yes, sir.

Q. Your responsibilities are not exclusively those of Precinct 3.

A. No, sir.

Q. Now, during the course of your years here in the county and your time of service on the commissioners court, you have, of course, had occasions to traverse from north to south and east and west of this county.

A. Yes, sir, I believe I have covered every road in this county.

Q. Yes, sir, I am sure you have, and, of course, you are not—you wouldn't tell the Court here today, or you would tell the Court here today that there is no question but what by far the large majority of the people of Midland County live in Precinct No. 1. Now that is true, isn't it?

A. Well, it is always a known fact in all west Texas counties it is mostly one larger town and that's the—

Q. And isn't that—

Mr. Browder: Now wait just a minute. Your Honor, counsel has been interrupting the witness half the time. The witness wasn't through when counsel started asking him another question. I am going to ask that the witness be permitted to take his time, wait until counsel gets [fol. 257] through with his question, and that the witness be permitted to answer the question completely and fully before counsel starts again.

Q. Mr. Moreland,—

Mr. Browder: Now wait just a minute! Let the Court rule.

The Court: All right, that will be permissible. Of course, if his answer is not responsive, well, then I think then—

Mr. Browder: Counsel will interrupt to you and not the witness.

The Court: All right.

Mr. Browder: Now just let the witness answer.

The Court: All right.

Mr. Browder: And the witness hasn't answered when counsel interrupted, and I'll let the Reporter read back if counsel—

The Court: I think I can run the Court, Mr. Browder. You will have your seat.

Mr. Olson: Thank you, your Honor.

Mr. Browder: I do address myself to the Court.

The Court: I understand.

Q. Mr. Moreland,—

Mr. Browder: I don't think he had completed his answer [fol. 258] when counsel interrupted him.

The Court: Well, let's let him have his seat and let him frame his question again, counsel.

Q. Mr. Moreland, first of all I would like to apologize to you if I did not give you an opportunity to answer the questions I asked you. Now, by and large there is no question but what the large majority of the citizens of Midland County live in Precinct No. 1. Now that is true, isn't it?

A. Of course, like I started to tell you, in all west Texas counties there is mostly one larger town, and that is where, naturally, the most of your population is. Anybody can see that most of the population is in the town, but we are not running the city government.

Q. Well, I appreciate the fact that you are not running the city government.

A. Yes, sir.

Q. Now, Mr. Moreland, Precinct No. 3 is very sparsely populated. That is true, isn't it?

A. Well, sir, it has got some areas in it that is pretty well populated, and there is areas in it that is ranch land and it don't have a very large majority of people in it, sure.

Q. Now under this 1963 Order, you heard Mr. Max Schumann testify yesterday that in Precinct No. 3 that he had

gone out there and checked the width and found that there [fol. 259] were, occupied and unoccupied, 146 dwellings in Precinct No. 3. Now you have no quarrel with those figures, do you, Mr. Moreland?

Mr. Pannill: Now, your Honor, we are going to object to him asking this witness to evaluate or pass on the credibility or accuracy of another witness. If he wants to ask him how many are there, if he knows, then the Court can judge for himself whether his testimony is the same as or different from the other witness.

Q. You say that is substantially correct?

Mr. Browder: Now wait a minute! Let the Court rule.

The Court: I didn't understand your objection as being an objection, counsel.

Mr. Pannill: Well, we object to his question on the ground that it calls for a conclusion of the witness as to the accuracy or credibility of another witness, which is a matter for the Court to determine and not for this witness to testify about.

Q. Well, you know about how many—

Mr. Browder: Let the Court rule.

The Court: I am going to sustain the objection, as far as it goes. You can ask the witness if he knows and then if he knows what the figure is.

Q. Very well. Do you know about how many dwellings [fol. 260] are located out there in your precinct, Mr. Moreland?

A. I don't know the exact number.

Q. Would you say about 150, just roughly?

A. I wouldn't know exactly, sir.

Q. Well, would that be a pretty good estimation?

A. It could be more.

Q. It could be more—

A. Yes.

Q. —and it could be less, but you would say, generally, in the area of 150.

A. I think there would be a few more.

Q. And then, Mr. Moreland, a man living in the area that has about 150 dwellings throughout the area and having lived there 20 years, I imagine you know most all the people living in Precinct 3. That is true, isn't it?

A. I do now. Before I ran for office I did not. I didn't know 20% of them before I ran for office.

Q. Well, would you say there is about, and again I am not trying to pin you down specifically, but taking into consideration the fact that you say there is about 150 dwellings in that area, more or less, and taking into consideration the further fact at the recent election there were about 90 votes cast, would you say that there are about 400 people that live in Precinct 3?

[fol. 261] A. Well, I wouldn't know, because I don't know whether all paid their poll tax or not.

Q. Well, I know. I am not talking about those that paid poll taxes. I say, would you say that there is about, without having to repeat, 400?

A. I think there would be more than that, yes, sir.

Q. Well, would you say it would be more than 500?

A. It could be.

Q. Would it be more than 600?

A. Well, I don't know, sir.

Q. Well, what would be your best judgment?

A. I just don't know.

Mr. Browder: Now, your Honor, the witness has said he didn't know and answered the question. Further pressing is argumentative, and we object to it on that ground.

The Court: I sustain the objection.

Q. Do you have a judgment?

A. It is not a great number, no, sir.

Q. And would you say it is less than 1,000?

A. I would think so.

Mr. Pannill: Your Honor, he has answered that he doesn't know.

Mr. Olson: He said it is less than a thousand. I don't know; I haven't been out there.

[fol. 262] The Court: Proceed.

Q. Mr. Moreland, you stated that you were a member of the commissioners court and, as such, took care of the business of Midland County. Now do you and your fellow members of the court meet regularly to take care of the various business activities of the county?

A. Yes, sir.

Mr. Pannill: Your Honor, we object to that question as being duplicitous as stating a fact which is not in evidence and is calling for a conclusion of this witness, insofar as he was asked if they took care of the business of Midland County. He is a commissioner, and he performs the duties of a county commissioner. Whether that does or does not constitute the business of Midland County is a legal conclusion, and we object to the question and the answer which it seeks to elicit on that ground.

The Court: Overrule the objection.

Q. Answer the question, please.

A. Will you please state it again?

Q. Do you, as a member of the commissioners court, sitting with the other members, elected members, of the commissioners court from Precincts 1, 2, and 4, and the county judge, take care of the business matters of Midland County?

A. Yes, sir.

[fol. 263] Q. Now do you meet regularly or do you meet on call of the member voters?

A. We meet regularly twice a month and have a special meeting at any time any member of the court or the county judge sees fit.

Q. And when do you meet regularly?

A. The second and fourth Mondays.
Q. Of each month, and you meet here in the courthouse?
A. Commissioners court room, yes, sir.
Q. In the city of Midland.

Mr. Browder: Now, your Honor, that again, and I address myself to your Honor, but counsel absolutely interrupted the witness before he was half through. I am going to ask the Court to instruct counsel to refrain from starting his questions until the witness is completely through with his answers.

The Court: Try to watch yourself.

Mr. Browder: Now may the witness be permitted to answer the question, and may the question be read by the Reporter so we will know that it is the same question?

The Court: All right, let the Reporter read the question and, if there is any doubt, he can rephrase the question.

(The last three questions asked the witness as above [fol. 264] set out were read to the Court and counsel.)

Mr. Olson: My question was whether they meet here in the city of Midland.

The Court: Is that the question?

(The Reporter repeated the last question by counsel, as follows:)

"Q. In the city of Midland."

A. I think that all county commissioners and county judges meet in the courthouses of every county in Texas, sir.
Q. Well,—
A. We do, too.
Q. —I am not concerned about the other counties in Texas, Mr. Moreland.
A: Well, that's the law. That is where we meet.
Q. Now, just answer my question, if you would, please.
A. Well, I just did, sir.

Q. You meet here in the courthouse.
A. Yes, sir.
Q. In the city of Midland.
A. Yes, sir.
Q. Twice a month.
A. Yes, sir.
Q. Regularly.
[fol. 265] A. Yes, sir.
Q. Now, Mr. Moreland, when you meet here in the courthouse in Midland County as a member of the commissioners court, do you take care of various business activities of Midland County?
A. Yes, sir.
Q. Would that include such matters as buying equipment for all of Midland County?
A. We do, sir.
Q. That would include buying all types of county equipment used in Precincts 1, 2, 3, and 4. Is that right?
A. Yes, sir.
Q. Mr. Moreland, I will ask you whether or not, also, in some of these business stations that you have if you adopt the budget for the city of Midland.
A. Yes, sir, once a year.
Q. For Midland County.
A. Yes, sir, once a year, not for the city of Midland but Midland County.
Q. And does this budget take care of all the expenditures of the tax funds.
A. Yes, sir.
Q. Of Midland County.
A. Yes, sir.
[fol. 266] Q. This budget sets forth the salaries that are paid to the employees of Midland County. Is that right?
A. Yes, sir, we set all salaries.
Q. Does this budget also set the salaries of the commissioners or is that set by statute, or do you know?

A. We do set them. You have a statute that you can go by up to a certain fee, according to the population and various things, but we do set the salaries of everyone in the courthouse including our own.

Q. You set your own salaries?

A. Yes, sir, of all elective officials plus ours.

Q. And you appropriate the money for these salaries through the establishment of a tax rate. Is that correct?

A. Yes, sir, we sure do.

Q. And the tax rate for Midland County is established by the commissioners court composed of commissioners from 1, 2, 3, and 4, and the county judge. Is that right?

A. Yes, sir, that is right.

Q. Now under your procedure, does the county judge vote except in a tie?

A. No, sir, she does not.

Q. So, actually, these decisions, if there is not a tie, these decisions about the setting of salaries, the adoption of a budget, the adoption of tax rates, made to affect all of [fol. 267] Midland County, are made by the commissioners from Precincts 1, 2, 3, and 4. Is that right?

A. That is right, sir.

Q. Now, Mr. Moreland, in addition to the establishment of the tax rates and adoption of budgets and the purchase of equipment, and so forth, I will ask you whether or not the commissioners court also sits as a Board of Tax Equalization.

A. We set as a Board of Equalization, yes, sir. That's the law.

Q. All right. Now, as a Board of Equalization, the duties and responsibilities of the commissioners court are what? What do you do in a Board of Equalization?

A. We listen to each taxpayer that comes in. They are sent a notice that their taxes are raised. We listen to each one that comes in and we check it to see if it is unfair with the values around it, or anything of that nature, and if they are unfair we are supposed to change them.

Q. If you think a taxpayer's tax value or the value that is rendered by the taxpayer is too low, you will raise it, or if too high you will lower it. That is true, isn't it?

A. Well, sir, that is our job, you know, to see if they come up. The tax assessor sends them a notice if it has been raised, and the tax assessor is the one that does send out all notices. He is the one that sets the tax on their land, [fol. 268] the houses, or any improvements that they have. Any business, any personal property, or anything, the tax assessor does set it on there, and then they come to us if they think it is not right.

Q. Don't you, as a member of the Board of Equalization, meet in private sessions and go over the tax rendition sheets as prepared by the tax assessor and collector prior to the time these notices are sent out?

A. No, sir, we do not.

Q. You do not.

A. No, sir.

Q. Now, Mr. Moreland, before I get on another matter here I want to go back a little bit. How close do you live to your nearest neighbor?

A. Sir.

Q. How close do you live to your nearest neighbor?

A. About one block.

Q. A block?

A. Yes, sir.

Q. Is there a cluster where you live or is there from there a good—

A. Another block.

Q. Another block?

A. Yes, sir.

[fol. 269] Q. Are those kinfolks or just people—

A. Well, one of them is and one of them is not.

Q. Now, Mr. Moreland, do you have a constable in Precinct No. 3?

A. No, sir, we do not.

Q. Have you ever had one?

A. Not to my knowledge.

Q. Was one elected this year?

A. No, sir, there was not. No one run.

Q. And you have never appropriated any money for the payment of a constable.

A. No, sir, we have not.

Mr. Browder: I am going to object to this question about money paid to a constable or a constable being elected for a precinct as being immaterial and irrelevant.

The Court: I will sustain the objection.

Q. Do you have a justice of the peace in Precinct No. 3?

A. No, sir, we do not.

Q. Now, Mr. Moreland, in addition to the various things you have related, I will ask you whether or not it is the duty and responsibility of you members of the commissioners court to distribute the monies in the Road and Bridge Fund.

A. The spending of the money of the Road and Bridge Fund, yes, sir, we do. That is the main job of the county [fol. 270] commissioners.

Q. And it is your responsibility, the commissioners of Precincts 1, 2, 3, and 4, to decide how much will be spent in each specific precinct.

A. No, sir, we have a unit system. We do not have our Road and Bridge money divided in Midland County, and we all draw from the same fund.

Q. All right, you said you have a unit system. Just tell me what a unit system is, Mr. Moreland.

A. Well, a unit system, we have all our equipment together, and that way we are cutting down on our expenses. We have one road overseer.

Q. Have what?

A. One road overseer.

Q. Do you spend the same amount in each commissioners precinct? Is that what this unit system is?

A. Well, sir, we have it set up. The way we have it now, each one of us is putting in approximately three miles of paved road in each precinct.

Q. In other words, each year Precinct No. 1 gets three miles of paved road, Precinct No. 2 gets three miles of paved road, Precinct No. 3 gets three miles of paved road, and Precinct No. 4 gets three miles of paved road.

A. We had it worked out like that, but if there is another [fol. 271] precinct that needs something—Precinct 1 has always drawed some more pavement at times and, if they need it, we work together.

Q. If No. 3 needs it, then additional work is done in No. 3.

A. We try not, you know, to take it from each other, but if we do see a job in my precinct I wouldn't mind asking for it, no.

Q. Asking No. 1 to give you some of his money to put in 3.

A. Not the money, sir. We got our money altogether and we do not have it set apart.

Q. Well, this money is divided by the commissioners court. That is the point I am trying to get at.

A. No, sir, we do not divide it.

Q. Well, who divides it?

A. We just have it in the Road and Bridge Fund, and we put so much money in our budget. We work these different precincts with it and pay the bills out of this one fund.

Q. But the commissioners court decides, basically, how much will be done in each one of the commissioners precincts.

A. Not basically. We have just kind of a rule that we do put three miles in each precinct, and some years I have seen more precincts that didn't pave any and some years paved more than three miles. It is just according to what [fol. 272] you get paved in. I have a problem of water in my precinct and—

Q. Drinking water?

Mr. Pannill: Now, your Honor,—
The Court: Don't interrupt him.

A. I have a problem of water, and sometimes I have to wait in the wintertime or sometimes we have to truck the water a long ways to get the paved road, and we work it around to different times and work at different seasons of the year where each one of us can have the equipment. We take this equipment around to each precinct at certain times of the year when, you know, we get ready to do some extra work.

Q. All right. Now, Mr. Moreland, does it also fall within your duties and responsibilities that you perform as a member of the commissioners court, you and the other three members, to expend the bond funds of the county?

A. Yes, sir.

Q. Does it also come under your responsibility and do you and the other three members of the commissioners court call all of the county elections, canvass the returns, and declare the results of these elections?

A. On general elections and the bond elections, yes, sir.

Q. Well, is it also true on commissioners elections?

A. No, sir, we don't canvass primaries.

[fol. 273] Q. Who does that?

A. The Democratic Party and the Republican Party.

Q. All right. Now, Mr. Moreland, you have testified here earlier that by and large the much larger population of Midland County is located in Precinct No. 1.

Mr. Pannill: Your Honor,—

Q. In view—

Mr. Pannill: Excuse me, counsel.
The Court: Go ahead and finish your question.

Q. Now were you a member and sitting on the Board of Equalization when this matter of redistricting the—I mean the commissioners court—when this matter of redistricting the commissioners precincts came before you?

A. When Mr. Avery came up and—in September 1963?

Q. Yes.

A. Yes, sir, I sure was.

Q. This has been an issue ever since you have been on the court. That's true, isn't it?

A. Oh, there have been lots of people who have wanted to take over control for several years.

Q. I didn't hear what you said.

A. There has been a bunch that has wanted to take over control for several years, yes, sir.

Q. A bunch wanted to take over control of what, Mr. [fol. 274] Moreland?

A. To get everything up here in one little cluster.

Q. In other words, you mean the people.

A. No, sir, not the people; a little group.

Q. Now, Mr. Moreland, first of all before we get into detail on that. I believe, is your house where you live taxed for tax purposes?

A. Sir?

Q. Is your house on the tax rolls?

A. I believe they put it on this year.

Q. Has it been on prior to this year?

Mr. Browder: Now, your Honor, we object to the question as to whether his house has been on the tax rolls as being immaterial and irrelevant on the question of division of the county into commissioners precincts.

Mr. Olson: If it please the Court, we have pled in this case that the commissioners court has abused its discretion in the way this county is divided up for the reason that the members in these areas where the population is small and sparse have controlled the commissioners court and have determined and established a Board of Equalization. We have claimed that this action on their part is arbitrary, capricious and unfair to the vast majority of the citizens of Midland County. I intend to prove by this witness that [fol. 275] prior to this year, even though the improvements, the houses of the citizens of the city of Midland,

were placed on the tax rolls, that the improvements and the houses in Precincts Nos. 2, 3, and 4 and outside of the city of Midland, were not placed on the tax rolls. We think it is extremely material in that respect.

Mr. Pannill: Your Honor, the counsel's petition contains that allegation. The Court has heretofore sustained an exception to a similar or comparable allegation. The Court has, as I understand it, under advisement at this time another exception to the renewed allegation. Now, your Honor, the issue which has been made here is whether the commissioners court abused its discretion when it prepared a redistricting Order on August 31, 1963, to attempt to drag into this controversy questions as to claimed or imagined inequities as to tax valuations, those completely beyond the scope of pleadings in this case. The tax valuations of property in this county, both urban and rural, have been passed on and found to be correct by successive Boards of Equalization of the county, of the city, and of the school district. For this plaintiff to come into this Court at this time and attempt to show something is wrong with tax valuations, which have been duly and legally passed upon, constitutes a mere collateral attack on a quasi-judicial find of the Boards of Equalization. This plaintiff has no proof or [fol. 276] allegation that he has appeared before any of the Boards of Equalization, that he has so tested any tax values, that he has suffered any financial harm as a result of that. He has not joined as a party to this suit, the public official whose primary duty it is to fix the tax valuations. Consequently, we have it here by this line of questioning and we can anticipate it for further questions, to attack collaterally in this proceeding the findings of Boards of Equalization of the county, of the city, and of the school board. We object to it on the ground that it is irrelevant and immaterial to any issue in this cause.

Mr. Browder: Your Honor, we wish to add to that—

The Court: Without any further argument on this particular thing, since the Court has been carrying it along

until we reached this point, I would like to talk to counsel in chambers here. I think we might get it going a little more smoothly. While on the record, I would like to have a little discussion with counsel in chambers.

(Following the discussion of Court and counsel in chambers, all parties returned to their respective seats in the courtroom and the trial proceeded as follows:)

Mr. Olson: The Court has sustained the objections that [fol. 277] were made?

The Court: The special exception, in other words now, as far as—

Mr. Olson: Well, I understand they made an objection to his testimony, but the Court is now ruling on the special exception which he took under advisement.

The Court: That's right, that is correct.

Mr. Olson: You are making no ruling on the objection.

The Court: Well, I don't recall the objection. I thought we were just—I thought the objection was asking the Court to go ahead and rule on the special exception.

Mr. Pannill: It was a two-prog—

Mr. Olson: (Interrupting.) I will ask him a question, then.

Q. Mr. Moreland, prior to this year I understood you to testify at the time counsel made the objection that the improvements located on real property located outside the corporate limits of the city of Midland were not placed on the tax rolls. Is that correct?

A. Yes, sir.

Mr. Olson: That is the question.

Mr. Pannill: Your Honor, to that question we object on the ground that it seeks to elicit information from this [fol. 278] witness which constitutes a collateral attack on the valuations placed on real property and personal property by the tax assessor and passed on by the Board of Equalization, in that it goes beyond the scope of proceed-

ings in this case and in that it is irrelevant and immaterial to any issue in this case and could not form a basis of decision one way or the other as to whether or not there was an abuse of discretion in the August 1963 Order. For all of those reasons we object to the question.

The Court: I sustain the objection.

Mr. Olson: May it please the Court, I would like for the record to show at this time that this evidence is introduced, is offered, for the limited purpose of showing abuse of discretion on the part of the commissioners court, who, as the testimony shows in this case, set and have set as a Board of Tax Equalization for Midland County.

Mr. Pannill: We renew the objection, your Honor.

The Court: I sustain the objection.

Mr. Olson: May we make it further—further, for the limited purpose of showing abuse of discretion on the division of this county of commissioners precincts by the Order adopted on August 31, 1963.

Mr. Pannill: We renew the objection.

The Court: I sustain the objection.

[fol. 279] Mr. Olson: We would like at this time to make our Bill, your Honor.

The Court: All right, you may start on it.

Mr. Pannill: As heretofore, we will ask that counsel notify us when he has completed his Bill so that we won't raise any objection, and until he notifies us we will assume that all of this is on the Bill.

Q. Mr. Moreland, you understand at this time we are making a Bill for the purpose of the record. Would you answer my question as to whether or not prior to this year the improvements located on real estate located outside the corporate limits of the city of Midland were placed on the tax rolls or were not placed on the tax rolls.

A. O. K., can I explain it to you?

Q. Yes, sir.

A. All right. In 1956, I believe, Pritchard & Abbott, an evaluation firm, made a survey of Midland County and

they put everything on. All right, as far as the improvements showing on there, they do not, but as far as being on there, you know yourself, that land and everything we have put on, including improvements, were included with it. There has been some fuss and some sore, and everything, since all this started about putting improvements on separate. The way I see that, if you tax the land and then come [fol. 280] along and put improvements on it separate, well, all you can do then, as far as putting improvements on there, is just what they will bring and they put it on and take it off.

Q. So your answer to my question is "no, they were not." Is that correct?

A. Sir, they were put on there. Everything was included. They just list a separate parcel of land, such as a section number and a block number, and they put it on there as a total figure.

Q. And did not show real estate, so much improvements so much, but only—

A. (Interrupting.) It just showed so much tax on the land.

Q. Now the improvements were placed on the tax rolls inside the corporate limits of the city of Midland, were they not?

A. I believe they are taxed just the same, the lot plus the house.

Q. Plus the house, but—

A. (Interrupting.) I imagine it is. They'll just put it on there as so much a front footage and everything.

Q. In other words, inside the corporate limits of the city of Midland, the tax rolls showed a lot plus the house but outside it just showed the land and no mention was [fol. 281] made of the improvements?

A. That is correct, just a piece of property is what it showed. What we go by is a piece of property, and they will tell us what is on there or what kind of property it is. All we got is the card to go by or knowing it by its description or by sight.

Q. But this year the land has remained the same but you have started putting the improvements on the—

A. (Interrupting.) I haven't done nothing. I am not tax assessor.

Q. Well, you are on the Board of Equalization, aren't you?

A. I haven't made the Board of Equalization yet, though.

Q. Well, what I asked you and I understood you to say earlier was that this year it was on. Now what—

A. (Interrupting.) I talked to the tax assessor and he said that they had changed it, so far as my end is concerned.

Q. Mr. Moreland, I understand the tax assessor made up these various tax rolls and tax sheets that were furnished to you, but you, sitting as a Board of Equalization, did you consider the land in the area exclusively as land or as land with improvements located on it?

A. Sir, the ones that came to us on the Board of Equali- [fol. 282] zation complained about their property. We looked into it and then we looked at the other and then we thought if they were satisfied we were satisfied.

Q. Without taxing the improvements.

A. Sir?

Q. Without taxing the improvements.

A. The tax assessor didn't have them on there.

Q. Yes, but I say you were satisfied with—

A. (Interrupting.) Yes, we just set that—we just got one day, sir, to set as a Board of Equalization. The tax assessor plus all his help has got the whole year, and we got one day.

Q. Well, you could sit longer than one day if you wanted to, couldn't you?

A. Yes, but we can't set a whole year. We got other things to do.

Q. It is your testimony that the Board of Equalization, ever since you have been sitting on it, equalizes all the

values of all the taxes on all the property in Midland County in one day.

A. No, sir, we have run into more days than one.

Q. How many?

A. Sir.

Q. How many?

[fol. 283] A. Oh, it has run into two or three days. The school board and city council meet at the same time we do and they generally beat us through, and they have the same tax on this property out there at the school board as we have ourselves, the county has. If we are so far wrong, they are wrong, too.

Mr. Olson: Well, of course, we object to that on the ground it is not responsive.

The Court: I sustain the objection for you.

A. (Continuing.) Well, it's true.

Mr. Olson: And ask it be stricken from the record.

A. (Continuing.) I say it's true.

Mr. Olson: Now, if it please the Court, we thoroughly object to that. Whether it is true or whether it isn't I don't know, but it wasn't responsive.

The Court: I understand. I sustain your objection.

Q. Mr. Moreland, do you know what percentage of value you, as a Board of Equalization, place on the property throughout the county?

A. Sir?

Q. What percentage of value—

A. Twenty percent.

Q. Is that true in both Precincts 1, 2, 3, and 4?

A. Yes, at a dollar five.

[fol. 284] Q. A dollar five is your tax rate?

A. Yes.

Mr. Olson: If it please the Court, we reoffer into evidence each word, sentence and paragraph contained in the Bill of exception—

The Court: Except those which you took special exception to?

Mr. Olson: —which the Court sustained and instructed to be stricken from the record.

Mr. Pannill: We renew the objection.

The Court: All right. I sustain the objection.

Q. Now, Mr. Moreland, moving on a little bit now to this matter of the redistricting of the county. Now were you present at the time Mr. Avery presented his plan of proposed redistricting to the commissioners court?

A. Well,—

Mr. Browder: Your Honor, I would object because there were several plans presented and I think it has been shown Mr. Avery was there several times, and I don't know what time counsel is inquiring about and I doubt if the witness knows.

Mr. Olson: Now, if it please the Court, let the witness answer. He can state—

Mr. Browder: Wait just a minute. The question was [fol. 285] ambiguous and I do not know what plan or what presentation the council—

The Court: Let's let the witness answer and see whether he knows what he is referring to and then find out.

Q. Mr. Moreland, were you present in the commissioners court when Mr. Avery presented this prepared plan for a proposed redistricting of the county, as set forth in Exhibit No. 32?

Mr. Browder: I certainly have no objection to that question, your Honor.

Mr. Olson: Thank you.

A. There were so many plans there, I really don't know, sir. The first morning they were presented, the majority of the court wasn't there. They came later and there were so many plans, I really don't know. He would have to identify the one he had. I seen so many I don't know.

Q. You were here in the courtroom yesterday when he said this is the one he presented, weren't you?

A. Yes, sir.

Q. Is that the one he presented or do you know?

A. I don't know whether that is the one he presented or not.

Q. Well, have you ever seen that plan before?

A. I have seen a lot of them.

[fol. 286] Q. I didn't ask you that, Mr. Moreland. Have you ever seen that plan?

A. I don't know.

Q. Well, would you mind looking at it a little bit and tell us?

A. Yes, sir, I will.

Q. You mind or you don't mind?

A. No, sir, I wouldn't mind, no.

The Court: Let's don't speak so argumentally to the witness. Let him go ahead.

Q. Have you seen it before?

A. I don't know; I imagine I have.

Q. All right, sir. Mr. Moreland, you understand these numbers, 1, 2, 3, and 4 on here mean the commissioners precincts. You understand that, don't you?

A. Yes, sir.

Q. You understand that these black lines right here represent the city of Midland.

A. Yes, sir.

Q. And you understand that these lines as set forth here (indicating on exhibit) represent the proposed boundaries of these various commissioners precincts. You understand that?

A. Yes, sir.

Q. Now then, Mr. Moreland, looking at these various [fol. 287] proposed precincts, those are not the ones as they now exist, are they?

A. No, sir, they are not.

Q. Now, population-wise, based on your acquaintance with the county as a whole, I will ask you whether or not, population-wise, you think the areas as set forth in Exhibit No. 32, pretty well divide the county equally in population. Of course, I realize you don't know exactly, but I mean generally.

A. Coming in here and around this way (indicating on exhibit) here?

Q. Yes. See here, it comes down here and then around. You see this black is the city of Midland.

A. Yes, sir.

Q. You see and, of course, this is your line, and here is your line for 4 and then 3 and then 2. That would—I don't think there is much question but what that would pretty well divide the county. I am talking only about numerically now in accordance with numbers.

Mr. Pannill: Is he asking the witness or is he making a statement?

Mr. Olson: I am asking the witness.

Mr. Pannill: All right.

A. It looks like he is just dividing the city up and throw-
[fol. 288] ing it out in the county.

Q. So it looks like it is pretty well divided equally, so far as the county is concerned. You would agree with that, wouldn't you?

A. You want me to state how I think that would be divided?

Q. How it should be divided?

A. No, how that is divided.

Q. No, I don't want you to tell me how it is divided. I did want you to answer my question, if you don't mind.

A. Well, sir, that wouldn't necessarily divide it perfectly.

Q. I didn't ask you perfectly. I said, generally, if it would divide it equally.

A. No, it wouldn't divide it too good.

Q. It wouldn't?

A. No, sir.

Q. Well, which one would have more than which other? You just point out to me and say O. K. You say this doesn't divide equally, so you show me which one has more people and which one would have the smallest number of people.

A. Well, it looks like the way the city of Midland is drawn it would have the most people.

Q. Well, now we have got that divided, haven't we?

A. Sir?

[fol. 289] Q. Maybe you don't understand.

A. I do understand.

Q. O. K., then tell me where we are off, which one has too many people in it.

A. This one down here don't seem to have enough people.

Q. Doesn't seem to have enough people?

A. No, sir.

Q. So you think that Three is not as heavily populated as One, Four, and Two. Is that right?

A. Well, I wouldn't think so, the way the town is kicked around some, no.

Q. But you say, generally, it is pretty equally divided, wouldn't you?

A. Population-wise?

Q. Yes, sir.

A. Population-wise, yes.

Q. That is all I wanted you to say, whatever the facts are. Now then, as far as values—when I say values I am talking about property values throughout the county. You are familiar with these various deep wells, where they are located, where the gins are located, and where the refineries are, and so forth?

A. Yes, sir.

Q. Would you say that the commissioners precincts as set [fol. 290] forth in Exhibit 32 pretty generally, and, again, I am not trying to pin you down, and if it is not a fact I want you to tell me it is not a fact. Would you say that

pretty generally it divides the county into equal tax values, property values?

A. Oh, not necessarily.

Q. Well, I say but generally.

A. No, sir, I am not going to say that.

Q. Tell me how it does not.

A. You got lots of things to take into consideration when you go to dividing the county, sir.

Q. I am talking about values now.

A. Values, then. I will come to that.

The Court (to witness): Let me ask you to take your seat unless you are going to be pointing to the exhibit.

(The witness takes his seat in the witness chair.)

Q. Go ahead.

A. Your values, you have got a lot of kinds of industry,—

Q. Uh huh.

A. But mostly we know it is oil and gas.

Q. Uh huh.

A. Midland County is known for oil and gas, and the others are minor, and as far as giving the values all down [fol. 291] in here, you know, I don't know correctly up to a few dollars how all this would go and coming in here, the way it is set up, Four would have lots of value.

Q. Uh huh.

A. More so than Two, maybe, a great deal, and so far as just setting in here and asking me on a Minute book to prove the value, I wouldn't think that would be correct.

Q. You don't know—well, the city is pretty well divided and if the biggest part of the value is in the city, it is pretty equally divided there, isn't it?

A. As far as value on the whole, the city don't have all the value, no, sir.

Q. They don't have what?

A. They don't have all the value, no.

Q. I didn't say they had all of the value.

A. Well, I don't know, the way you are bringing it around there, but there is a lot of things to consider in dividing the county.

Q. Now what about the roads, Mr. Moreland? Would you say this pretty well divides the roads of the county fairly equally? You are familiar with the roads of the county, you say.

A. I have been on every one of them. Of course, sir, you don't live in this part of the country. We got lots of roads [fol. 292] and for me to circle this precinct, it is over a hundred miles the way I have to go around it. We've got lots of roads that don't connect.

Q. Uh huh.

A. County roads is what I mean. They connect eventually, but State roads come in and everything and, as far as the roads are concerned and all that nature, well, they do not connect or anything, and in order to get to them, why, these precincts right around the edge of town they are easier to get to, more so that Three or Four.

Q. Yes. But you would say that, generally, that fairly well divides the—

A. (Interrupting.) No, sir, because Precinct 1 would have just a little handful of roads the way you got that fixed.

Q. One wouldn't have as many roads as Four, Three, and Two. Is that correct?

A. No. 1 wouldn't have a handful of roads.

Q. What do you mean by a handful?

A. Just a few out here. You run out of the county here three miles north of town.

Q. How many miles would you say? Have you a judgment about how many miles of road?

A. The way that thing runs around it looks like a snake [fol. 293] crawling around, but I couldn't go from here (indicating) around through there. This is mostly all ranch land out in here and in coming here you go to hitting a few roads, but very few, and down in here south of the railroad there is very few roads.

Q. You don't have any judgment as to the number of miles of roads?

A. Sir?

Q. You don't have any judgment as to the number of miles—

A. I would say there just wouldn't be as many roads in One here as—

Mr. Browder: Mr. Moreland, you are going to have to talk a little slower and more distinct, because the judge wants to understand you and hear you and I want to hear you and understand you, also, and I am not able to understand you talk so fast.

The Witness: I am sorry.

Mr. Browder: And, Mr. Moreland, when you point, the Judge and the record wants to know what you are pointing at, so just point it out so the record will show.

Q. Now, Mr. Moreland, Plaintiff's Exhibit 31. You look at that. Are you familiar with the fact that these green lines represent the precincts as they were established on [fol. 294] August 31, 1963, effective on the 1st of January, and the red represents the precincts as they were prior to that time. Do you understand?

A. Yes, sir.

Q. Now were you present and did you take part in the decision to change or make this minor change to the precinct lines?

Mr. Browder: Now, your Honor, we object to the question because counsel terms this a minor change in August '63. That is a matter, of course, he can argue to the Court, but he is not permitted, as I understand the law, to make such assertion in a question to the witness, and I object to it on that ground.

The Court: Sustain the objection.

Q. Were you present when they made this change in August 31, changing about 12 square miles, I believe it was, in the whole county?

A. That is wrong, sir.

Q. Well, how many in your precinct—12 in your precinct?

A. Precinct 3 is 12 miles.

Q. I believe each one of those blocks represents a square mile on that map.

A. A section of land, yes, sir, is a square mile.

[fol. 295] Q. Mr. Moreland, what was the purpose of changing these lines? Could you tell me the reasoning behind the movement of these lines?

A. Yes, sir.

Q. Would you mind telling me?

A. Well, sir, we divided to give more equal roads, more population and more valuation and to better serve the people of Midland County.

Q. Did you in the 12 acres that were added to your Precinct 3, were anybody living in that area?

A. In 12 acres?

Q. Uh huh. Twelve sections.

A. No, sir, they do not.

Q. None at all?

A. No.

Q. Were there any roads in that section?

A. Yes, sir.

Q. How many roads?

A. Oh, possibly four or five miles.

Q. Mr. Moreland, how many people were—you stated no people were added to Precinct No. 3. Now how many people were added, if you know, to Precinct No. 2?

A. Well, a great deal.

Q. By a great deal do you mean a hundred or two hundred?

[fol. 296] A. Oh, no, more than that.

Q. Well,—

A. I am not a census taker and I really don't know.

Q. Well, I am sure you looked into that matter before you made a decision of approximately how many, did you not?

A. Sir, I don't know.

Q. Would you say two hundred, or you just don't know.

A. I don't know.

Q. You didn't look into it then, did you?

A. Sir?

Q. You didn't look into it?

A. Yes, sir, we know that there's a lot of people living there, but I'm not running around counting them.

Q. Well, you said that was one of the factors you took into consideration.

A. Yes, sir, we knew it would take a lot more people in there along with the roads and along with more valuation and better serve the people of Midland County.

Q. Now, how many people were added to Precinct No. 4?

A. I wouldn't know, but it was several.

Q. And you don't know there either, Mr. Moreland, do you?

A. No the number, no, sir.

Q. And the precinct lines were not changed in any way [fol. 297] so as to include a portion, part of a portion, of the corporate limits of the city of Midland. That is true, isn't?

A. We did not come in the city limits.

Q. So, actually, population wasn't too big a factor, was it, Mr. Moreland?

A. I do not think it is.

Q. Your do not think and you did not think at the time this Order was passed.

A. As far as population?

Q. Yes.

A. No, sir, and I don't think so today.

Q. And by the same token, you don't think that the number of qualified voters should be a factor to consider if you don't think people should be a factor to consider.

A. Sir, we serve Midland County to the best of our ability. The law says the value—

Mr. Olson: Now, if it please the Court, it is for the Court to decide what the law says.

The Court: I sustain the objection.

Q. So your opinion is that the number of qualified voters in a commissioners precinct is not an important factor.

A. There are a lot of factors to look at, sir.

Q. But I say that isn't an important factor. That is what you just testified to, wasn't it, population?

[fol. 298] A. Population.

Q. Yes, sir.

A. To run a county government? No, sir, I don't think that is the biggest thing, because—

Q. You don't think it is the substantial—

Mr. Browder: Wait a minute. Let him finish his answer.

A. Can I finish answering?

Q. Yes. Go ahead.

A. The thing about it is, the city of Midland has the city council and the mayor to run its business, which I wish they would, and we nave a whole county to run, and the law of Texas says that each county shall be divided into four precincts.

Mr. Olson: If it please the Court, I am going to object to him testifying what the Constitution of Texas and the law says.

The Court: I sustain the objection.

Mr. Browder: All he was saying, your Honor, is that the Constitution of the State divides the county into four precincts. Now as a commissioner he would have to know that and he—

The Court: I know that, counsel. Let's go ahead with the case.

[fol. 299] Mr. Browder: I mean, why he asked him what he considered and to explain it and I don't know how he can explain it without saying that he knew he had to divide it into four precincts. That is all I know.

The Court: All right.

Q. Mr. Moreland, you said—

Mr. Browder: Had the witness finished his answer?

The Court (to witness): Had you finished your answer?

The Witness (to Court): I was trying to tell him.

Mr. Olson: He was trying to tell what the law was, your Honor.

The Court: Let's just go back and start your question again.

Q. Now, Mr. Moreland, you said that the city shouldn't be, as I understood your answer, that the city shouldn't be considered too much in the county because they have their own council and mayor. Is that what I understood you to say?

Mr. Browder: Now, your Honor, that wasn't the statement of the witness. The witness did say the city should not be considered too much, that the city council would stand on its own, but I did not understand that answer, and I object to the question as an attempt to put words in the mouth of the witness which he didn't say.

[fol. 300] The Court: Overrule the objection.

Q. Did you say the city had its own city council?

A. They do have a city council, government and the city of Midland, which runs the city of Midland, but the county has to be cut up into four precincts in which we have it cut up to better serve the people, and you go to taking all things into consideration I think it does that.

Q. Of course, the city people are also county people. That is right, isn't it?

A. I realize that and are real proud of it. We are proud of our city service.

Q. Mr. Moreland, I have showed you Plaintiff's Exhibit 32, which is on the floor there, Mr. Avery's suggested plan for redistricting which he testified he had presented to the commissioners court, and you stated that you did not recog-

nize that plan, so I assume you did not take that into consideration in arriving at your Order of August 31, 1963. Is that correct?

A. Yes, sir, we considered all of them.

Q. But you don't remember the details of this one at all.

A. Well, so many of them looked so much alike. We laid them all out and looked at all of them.

Q. But you don't remember that plan specifically.

A. Well, don't hardly any of them vary a little bit. [fol. 301] Everyone of them brought them right in there to a little bitty focus point where the city and school is run from, and it's run from a little small area here in town.

Q. And you just rejected all of them then that did that.

A. No, sir, but we knew what they were trying to do.

Q. What who was trying to do, Mr. Moreland?

A. This little group that runs the city council plus the school board that rules a little six or seven block area here in town.

Q. What were they trying to do, Mr. Moreland?

A. I guess put the county up there with them.

Q. Well, of course, that is just an assumption on your part, isn't it?

A. Well, it is a pretty well known fact in Midland.

Q. Well known among the people in your area? Is that correct?

A. Well, you can ask anybody that lives out there if you want to. Either you don't live out there or you don't get on the council or school board.

Q. Well, of course, that's your opinion about that. Do you work anywhere other than for the council, Mr. Moreland?

Mr. Browder: Now, wait a minute.

Q. I mean other than the commissioners court?

A. Sir?

[fol. 302] Q. Do you work other than serving as a county commissioner?

A. I farm but I have some help.

Q. But you still farm—

A. Yes, sir.

Q. —and operate your farm, and what did you do prior to the time you were elected to the commissioners court?

A. I farmed.

Q. That is what you have done ever since you got out of school?

A. Yes, sir.

Mr. Olson: That is all we have.

* * * * * * *

[fol. 351] Redirect examination.

By Mr. Olson:

Q. Mr. Moreland, I believe you testified that one of the prime considerations that made you arrive at this redistricting was that you thought a commissioner could better serve an area or that you could better serve Precinct 3 if you lived down in the precinct. That was your statement, wasn't it?

A. Yes, sir.

Q. Of course, you understand, Mr. Moreland, that if you had adopted the plan proposed by Mr. Avery you could still live down in the precinct?

A. Sir?

Q. If the plan proposed by Mr. Avery had been adopted, you could still live down in the various rural areas of the precinct, couldn't you?

A. If I lived in Four?

Q. Regardless of the precinct number, if you lived down in the area of Precinct 3, if we switched the numbers around and you come in any of the precincts, you could have still lived down in the rural area, couldn't you?

A. Yes.

Q. If Mr. Avery's plan had been put into effect dividing the population so that each precinct had, roughly, a fourth

[fol. 352] of the city of Midland, where you stated the main population was, you could still live in the far part of the county and still serve in Four?

A. Yes, sir.

Q. You could live in the far end of the county and still serve Precinct 2?

A. Yes, sir.

Q. You could serve Precinct 3?

A. Yes, sir.

Q. You could live in the far end of the county and still serve Precinct 1?

A. Yes.

Q. I will ask you whether or not the commissioners court, in arriving at the redistricting, took into consideration the Negro population in the community?

A. Sir?

Q. My question was, if the commissioners court, in arriving at the redistricting, took into consideration the Negro population of the community.

A. Yes, sir.

Q. Did you take into consideration that, if the county had been divided at the point, of the possibility a Negro would be elected?

A. They can run at this time.

[fol. 353] Q. Just answer my question, Mr. Moreland. I say, did you take into consideration that if it was divided, as proposed by Mr. Avery or by some other of the propositions we have been talking about here today, that a large part of the population would be in one precinct and you would be afraid you would have a Negro elected at the polls. Was that discussed at the hearings?

A. I don't remember that it was.

Q. Would you say that it wasn't?

A. I don't remember.

Q. It may have been discussed and you not remember?

A. It could.

Q. Would the fact that the division proposed by Mr. Avery might have effect on the wet and dry condition of the county discussed?

A. Yes, sir.

Q. You did take that into consideration.

A. Yes, sir.

Q. Tell me about it.

A. Precinct 2, County Commissioners Precinct 2, is the only county precinct in Midland County which is dry at this time.

Q. All right?

A. And Greenwood, what is in Precinct 2, those people, [fol. 354] I don't think, approve of and use liquor.

Q. Of course, those people made that choice and not the commissioners court, didn't they?

A. Sir?

Q. They made the choice as to whether they would be wet or dry, didn't they?

A. As long as it was much that way, it would stay that way.

Q. You took into consideration all those things and the effect it would have as to whether it would be wet or dry and the possibility of it going either way.

A. Yes, sir.

Q. But you don't remember whether or not you considered the fact about the Negro population. You don't say you did or didn't. You just don't remember, do you?

A. No. They can run a commissioner now if they want to.

Q. I understand that. You appreciate the way the lines are drawn up can have a different effect on the Negro voting power. You understand that, don't you?

A. I don't believe the way it is divided there would throw all the Negro population in one precinct.

Q. I am not saying it would or would not, but that is one of the things you took into consideration, wasn't it? The Negro population is largely centered in one area?

[fol. 355] A. The south part of town, southeast and northeast.

Q. In this proposal of Mr. Avery, would your Negro population be predominantly in any of the precincts?

A. In Two and Three.

Q. It would be predominant in Precinct 3?

A. A town the size of Midland.

Q. You know where Cuthbert Street is?

A. Yes, sir.

Q. Assuming it went down through Cuthbert.

A. How would it go through?

Q. Right straight through.

A. East.

Q. Yes.

A. It would go into Three.

Q. Mostly, though, in Two, wouldn't it?

A. No, Three would catch the most.

Q. As it is now, all your Negro population is in Precinct 1?

A. Yes. No, not all.

Q. The biggest part of them are, though. Isn't that right? By far, the largest number of them?

A. Yes, sir.

Q. Now, Mr. Moreland, you said that the—you keep talking about the roads and took that into consideration so you [fol. 356] could live out there and watch over the roads. Did you say earlier that you didn't have any designated road fund for any precinct but put it in one pool and used the funds throughout the county?

A. Yes, sir.

Q. And you try to use it so that each precinct gets so much a year.

A. Yes, it takes more sometimes in one precinct than in others.

Q. You stated that primarily the commissioner from Precinct 1 handled city problems. You don't do any street maintenance inside the city?

A. No.

Q. What city problems are you talking about?

A. Well, if something was needed by people concerning the cemetery, they might call Mr. Bryant and also call us sometimes.

Q. Where is the cemetery?

A. About, I would say, ten blocks north of the courthouse.

Q. Within the corporate limits of the city of Midland?

A. Yes, sir.

Q. Did you say something about—I missed a little bit of your testimony because of the acoustics in here. I don't mean that critically, Mr. Moreland, but I missed some of it. [fol. 357] Did you say something about Little League? Did I hear you say, you know,—do you use any funds for Little League?

A. No, sir, you don't use county funds for Little League. It is a ball field up here beside the cemetery there that we do let them use the land.

Q. You do what?

A. We let them use that land.

Q. It belongs to the county—

A. Yes, sir, that's right.

Q. —and the Little League uses the land for playing baseball.

A. Yes, sir.

Q. Little League baseball. Who maintains that land for the Little League ball park?

A. The county and city. Mr. Gideon can tell you more about that than I can.

Q. You don't know?

A. He works with the Little League here. I work for the Little League in my precinct.

Q. At where?

A. In my precinct.

Q. Well, does the county have some property that they use for Little League in your Precinct 2?

A. No, sir, they do not.

[fol. 358] Q. You have a boy in the Little League?

A. I have some boys, yes, sir.

Q. And work with them. Yes, sir, I do, too. Did I understand you to say that you weren't in favor of making any changes at all? You like the old plan, and you don't want to change it at all but you went along with these other commissioners?

A. At first, yes, sir. I have a terribly large precinct.

Q. There are so many exhibits here I will try to help you find the one you are looking for. Is this the one you wanted to show me?

A. I was just going to show you that. As I say, I had the largest precinct. They all know it.

Q. Largest in area?

A. Yes, sir.

Q. But not the largest in population.

A. No, sir, it isn't.

Q. All right, show me what you wanted to, Mr. Moreland.

A. Well, the old precinct lines was to leave them as they were.

Q. And you were in favor of doing that rather than making these what I call minor changes that were made.

A. Well, I don't really call them minor, sir, but—

Q. Well, changes.

[fol. 359] A. All right, the thing about it is I had the largest precinct in area and it is large to cover, and I thought it was more fair and I could better serve it the way it was, yes, sir.

Q. But you were opposed to enlarging your precinct, take any portion of the city of Midland, and you are still opposed to it at this time?

A. Yes, sir, I am.

Q. Now, Mr. Moreland, you said you had a large area and you were in favor of this because it cut off some of your area. How many miles of roads did it cut off? Isn't it a fact that it just cut off about three or four miles?

A. What's that?

Q. Huh?

A. What I took on?

Q. Roads, yes, sir.

A. Right here? (Indicating on map.)

Q. Uh huh.

A. It just added on, I believe, about one, two, three miles, three or four miles. You see, it was a dividing line there. It's a road that runs through, sir.

Q. Well, actually, you—rather than cutting down on your miles, it put more road miles in your precinct, did it not? [fol. 360] A. It put two or three more, yes, sir.

Q. In other words, it put about three more miles, at least three more miles, for you to maintain in your precinct, this new Order.

A. Yes, sir, but at the time Mr. Gideon says, "If you do not want to move yours, that is all right." I said, "Well, it will help you out some. I will."

Q. If you don't want to move your what?

A. Don't want to move—don't want to take this in, he said it would be all right with him.

Q. Well, was Mr. Gideon one that proposed this plan?

A. No, sir.

Q. Who proposed it?

A. Well, Mr. Osborne, I believe, made the motion.

Q. Did he bring in the plan?

A. Sir?

Q. Did he bring in the plan?

A. I believe he did.

Q. Did he prepare it himself, or do you know?

A. I do not know.

Q. Did you consult any engineers, consult any statistics as to population prior to the adoption of this plan?

A. We don't run the county according to population, sir.

Q. And you didn't take into consideration any study, [fol. 361] didn't make any study or attempt to make any study about population in the various precincts?

A. Yes, sir, we sure did.

Q. Well, where are those studies?

A. Sir?

Q. Where are those studies?

A. We just made them.

Q. You haven't got them with you?

A. No, sir.

Q. You haven't got any figures?

A. I don't have them myself.

Q. Isn't it a fact that study showed that about 95 per cent of the population resided within Precinct No. 1?

A. That is all hearsay, sir. I do not know.

Q. You didn't make the study?

A. Sir?

Q. That is about right, isn't it? Wouldn't you say it is about right, that about 95 percent of the population of Midland County resides in Precinct 1?

A. I haven't counted it but, like I told you at the start, I didn't want to argue with you, but we all know that the population is in the city of Midland.

Q. And you are not going to argue the fact that 95 or 97 percent of the people reside in Precinct 1?

[fol. 362] A. I wouldn't know percentage-wise, the actual percent.

Q. Did you make a study as to the change in valuation in your precinct as a result of changing these lines?

A. Pritchard & Abbott and Mr. Dean can come up with that.

Q. I say, did you?

A. Sir?

Q. Did you? You are the one that passed the Order and you are the elected commissioner. Did you make a study about the effect this redistricting would have on your tax values in each district?

A. Well, sir, it's just there plain to see.

Q. Well, did you make a study?

A. Yes, sir, in a—

Q. (Interrupting.) Have you got that study?

A. No, sir, I don't have it.

Q. Well, who has it?

A. I do not know.

Q. Well, was one presented in writing to the commissioners court or to any individual member of the commissioners court that you know of?

A. I tell you what kind of study we made, sir. We went and looked and seen what would be put in there and we all know that well and we could kind of tell what kind of value they might place on it. We didn't know the exact value they [fol. 363] would raise, but we did know that it would raise a great deal of value.

Q. Well, did you go to the tax rolls and check what any of this was valued at prior to the time of the adoption of this Order?

A. Sir, we know on the Board of Equalization what a lot of this property is valued at.

Q. Well, all right, based on your past experience then, you say you took that into consideration, how much additional value was placed in your precinct as a result of the Redistricting Order?

A. In my precinct?

Q. Yes, sir.

A. Very little.

Q. How much?

A. Very little.

Q. All right, how much was taken away?

A. Not any.

Q. None? All right, how much additional value was placed in Precinct No. 4?

A. I wouldn't know, sir.

Q. You just don't know, and you didn't know—

A. Exactly. You can just see a lot of value would be placed there, sir.

[fol. 364] Q. Well, approximately how much?

A. I wouldn't know, because you just can see it would be there and we would know it would be more valuable, but we are going to operate all our funds together.

Q. But you don't know how much and you didn't know how much at the time this Order was adopted.

A. No, sir, not the exact figure, no.

Q. All right, what about Precinct No. 1? What effect did the change in the boundary lines have on the population in Precinct No. 1?

A. It had some change.

Q. Well, how much?

A. Well, I really don't know, as I told you this morning.

Q. You didn't make a study and you don't know.

A. I didn't go count it house by house, sir, I sure didn't.

Q. All right, what effect did the redistricting have on the values in Precinct No. 1?

A. It took some away.

Q. Sir?

A. It took some of it away.

Q. How much?

A. I do not know, sir.

Q. You don't know now and you didn't know in August of [fol. 365] 1963. Is that correct?

A. No, sir, not the exact amount, no, sir.

Q. All right, what about Precinct No. 2 and what effect did the change have on the population in Precinct No. 2?

A. I would imagine it increased it three or four times.

Q. Three or four what?

A. Three or four times.

Q. All right, how much is three or four times?

A. I didn't know what the exact figure was down there to start with.

Q. Well, give me your best judgment.

A. Well, I just don't know, sir.

Q. Well, you have an opinion. Is it a hundred or two hundred or a thousand, or what is your best judgment?

A. Less than a thousand; of course, less than a thousand.

Q. Sir?

A. It was less than a thousand, yes.

Q. Less than a thousand.

A. Sure.

Q. Were added or taken away from it?

A. It was less than a thousand people there, and I don't imagine there was that many people added.

Q. In other words, there was less than a thousand and—. All right, what about values? Did you take into considera-

[fol. 366] that in regard to Precinct No. 2?

A. Sure, it would place more value on it.

Q. How much values were added to or taken away from Precinct No. 2?

A. I don't know and I doubt whether the tax assessor knows at this time yet.

Q. Well,—

A. He hasn't got all the rolls brought up.

Q. Did you ask the tax assessor to get these figures together and bring them to you?

A. No, sir, I don't tell the tax assessor what to do.

Q. And you don't have those figures available now and you did not have them in August of 1963.

A. Sir, the kind of study we made was just a look to see kind of what was there. We went and looked and we figured on how much was there and how much more convenient it would be to the people it—just that way.

Q. You made kind of a horseback survey, then. Is that right?

A. Well, I don't think there is anything wrong with a horseback survey.

Q. Well, you made it from an automobile, didn't you, Mr. Moreland?

A. Yes, sir, we did.

[fol. 367] Mr. Olson: I believe that is all we have right now, your Honor.

* * * * * * *

[fol. 374] LOUIS OSBORNE, called as a witness by the plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Olson:

Q. State your full name, please.
A. Louis Osborne.
Q. You are the same Louis Osborne that is a defendant in this lawsuit?
A. Right.
Q. Is that correct?
A. Right.
Q. What is your address, Mr. Osborne?
A. West Highway 80.
Q. Where?
A. Midland.
Q. In Midland County, Texas?
A. Right.
Q. You have before you there on the easel Plaintiff's Exhibit 31, I believe, that shows the boundaries of the old [fol. 375] commissioners precincts and the new commissioners precincts. Would you point out to the Court and indicate by reference for the benefit of the record about where you live. I believe the pointer is there in front of you.
A. This won't miss it very far right here, three blocks off Highway 80 (pointing on the exhibit).
Q. You are indicating—what are you, some two or three miles east of the county line?
A. Three miles west of Terminal.
Q. Mr. Osborne, you are a member of the commissioners court of Midland County, Texas. Right?
A. Yes, sir.
Q. Do you have any other occupation?
A. Grocery store, a little mama and papa operation.
Q. Is your grocery store at your home?
A. Next door.

Q. How long have you been a member of the commissioners court of Midland County?

A. Since January 2, 1963.

Q. How many votes did you receive at the time you were elected to this position, Mr. Osborne?

A. I couldn't give you an exact count. I could go get it.

Q. I have some information before me that indicates you [fol. 376] received 79 votes. Does that sound about right?

A. It sounds pretty close.

Q. And that you had no opponent. Is that correct?

A. No, it is not correct.

Q. You did have an opponent?

A. Had four in the primary and it ended up in a runoff.

Q. Well, I was referring here to the general election in November. Did you have a Republican opponent?

A. No, I didn't have a Republican opponent.

Q. But in the general election you received 79 votes? Does that sound about right to you?

A. I guess that is about right.

Q. Now this area that you indicated as the place of your residence and your business out there on Highway 80, Mr. Osborne, is that kind of a populated little area out there?

A. It's building.

Q. Sir?

A. It's building pretty fast.

Q. It's building pretty fast?

A. Yes, sir.

Q. How close is your closest neighbor?

A. Oh, 75 yards, straight across the street, whatever width that is.

[fol. 377] Q. Mr. Osborne, at the time you became a member of the commissioners court of Midland County, this lawsuit we are involved in now was pending. Is that not correct?

A. That is right.

Q. The complaint at that time was that there should be a redivision of the commissioners precincts of Midland County, Texas.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. From the time you came on to this commissioners court on January 1, 1963, until a plan was adopted by an Order of the commissioners court on August 31, 1963, this was one item of business that pended before the commissioners court. Is that correct?

Q. Now as to your duties as a county commissioner, without going into great detail here, the commissioners court is the governing body of the county of Midland. Is that correct?

A. Yes, sir.

A. Of Midland County, yes, sir.

Q. You buy county equipment?

A. Yes, sir.

Q. And you adopt a budget?

A. Yes, sir.

[fol. 378] Q. You determine the distribution, if any, of the Road and Bridge Funds of the county?

A. Yes, sir.

Q. You authorize the sale and issuance of bonds, if any have been voted?

A. Yes, sir.

Q. And expenditure of funds, of bond funds, for the construction of public work.

A. Yes, sir.

Q. County work. You let contracts for such purposes?

A. Yes, sir.

Q. You set the tax rate?

A. Yes, sir.

Q. What is the tax rate?

A. Dollar five, or 20 percent of the value is a dollar five.

Q. Sir?

A. Twenty percent of the value at the rate of a dollar five.

Q. Is that 20 percent of the reasonable cash market value?

A. Well, let's see. State that again.

Q. You said 20 percent was the assessed value. Is that 20 percent of the reasonable cash market value?

[fol. 379] A. Well, I don't think anybody knows what the reasonable cash market value would be.

Q. All right, tell me what it is. Twenty percent of what?

A. Of the value, what it would produce.

Q. What it produces?

A. What the property would produce.

Q. What do you mean what it would produce? You mean if you had farm land how much cotton it would produce? Is that what you are talking about?

A. Yes, or pasture land.

Q. How many cows the pasture land would produce? Is that right? Is that how you arrive at value of land?

A. Part of it, yes, sir. Part of what you can sell.

Q. What else?

A. I don't know whether I understand just exactly what you mean.

Q. All right, what if you got ten acres out there that doesn't produce anything. How do you arrive at value?

A. Well, it wouldn't have much value.

Q. Wouldn't have anything, any value, and you make your assessments on that basis when you sit as a Board of Equalization. Is that right?

A. Well, I don't think we have ever found anything that [fol. 380] didn't have any value to it.

Q. Well, you've got some land out here that doesn't produce anything, don't you?

A. We have got some that don't produce much.

Q. Well, do you have some that doesn't produce anything?

A. No, I don't know of any like that.

Q. All right. But you arrive at value on what land produces. All right, sir. You also call certain elections, can-

vass the returns, appoint the election officials, canvass the returns and declare the results of the election, and so forth.

A. Yes, sir.

Q. And as part of your duties as a member of the commissioners court, you establish election precincts.

A. Yes, sir.

Q. Don't you?

A. Yes, sir.

Q. And justice of the peace precincts.

A. Yes, sir.

Q. And commissioners precincts.

A. Yes, sir.

Q. Have you got a constable out in Precinct 4?

A. No, sir.

Q. Have you got a justice of the peace?

[fol. 381] A. No, sir.

Q. Have you got a man right now who was nominated in a Democratic primary as constable for Precinct 4?

Mr. Browder: Your Honor, I object to that as immaterial and irrelevant on the question of subdividing this county, whether it is within the discretion or whether the commissioners exercised their discretion.

The Court: I sustain the objection.

Mr. Olson: May it please the Court, may I approach the bench?

The Court: Yes.

(Counsel for plaintiff and defendants approach the bench, converse with the Court, and then take their seats.)

The Court: I will sustain the objection, and you may have your Bill.

Q. All right, Mr. Osborne, I will ask you: isn't it a fact that a man—I believe his name is Fred Koonce—was nominated in the Democratic primary for the office of constable of Commissioners Precinct 4?

A. Yes, sir.

Q. And isn't it a fact that about the time he was announcing for public office out there for this position that you went by to see him and asked him to come before the [fol. 382] commissioners court?

A. Yes, sir.

Q. And he came before the commissioners court, didn't he?

A. Yes, sir.

Q. And you told him at that time "you just better save your money and not get into this race because there is just not enough people out here, there's just not enough business, to justify a constable in Commissioners Precinct 4." Now that is what you told him, wasn't it?

A. I didn't tell him that.

Q. Did someone tell him that?

A. I don't know what somebody told him, but I didn't tell him that.

Q. You didn't hear anybody tell him that. Is that your testimony?

A. That's right. Could I tell you what I told him?

Q. Well, let me ask you—yes, go ahead and tell us what you told him.

A. One reason we don't need a constable out there was straight across and angling across the street from me, why, I got a captain of the State Rangers over there.

Q. You got what?

A. Captain of the Texas State Rangers, and then directly [fol. 383] behind me I got a deputy sheriff building a new home back there, and then about 300 yards, for other protection, we have got a deputy state Ranger and cattle inspector, so we are pretty well protected out there. The Highway Patrol is in and out of that place there every day, a deputy sheriff patrols it twice a night.

Q. All right, but it is your testimony that neither you nor any member of the commissioners court in your presence told this man, Fred Koonce, "you just better save your money because we haven't got enough people or business out here to justify a constable."

A. I don't remember ever hearing anybody talk to him about people.

Q. Well, did they say "there's just not enough business out here to justify a constable"?

A. Why, I don't know of any business that they would have out there.

Q. Well, did you hear anyone make such a statement or did you make such a statement?

A. I didn't make such a statement.

Q. Did you hear anyone make such a statement?

A. I don't believe I did.

Q. Well, are you sure—

A. There was a lot of talk about it.

[fol. 384] Q. Are you sure?

A. Sure of what?

Q. That no one made such a statement in your presence.

A. That there wasn't enough people out there or enough business?

Q. That there wasn't enough business to justify a constable.

A. I didn't hear anything like that.

Q. Mr. Osborne, I refer you there to Plaintiff's Exhibit No. 31 again, showing the boundaries of the commissioners precincts as they existed prior to January 1, 1964, and as they have existed since that time, and the outline of the city of Midland. How long have you been a resident of the county of Midland?

A. About nine years.

Q. Are you acquainted with this terrain? Have you traveled over it? Do you know the lands of the county?

A. Pretty well.

Q. Do you know the people of the county pretty well?

A. Know most of them.

Q. Do you know the populated areas of the county?

A. Pretty well.

Q. You know it is a fact, do you not, that a vast majority of the people of Midland County, Texas, do now and

[fol. 385] have for many years resided within the corporate limits of the city of Midland?

A. Yes, sir.

Q. Now this Order adopted on August 31, 1963, I believe, was submitted by you. Is that right? This division in commissioners precincts?

A. Yes, sir. We finally adopted that one.

Q. Now, did you prepare it?

A. Yes, sir.

Q. All right, in preparing it you left all the corporate limits of the city of Midland, except Terminal out there, in Commissioners Precinct No. 1, did you not?

A. Yes, sir.

Q. And you knew in so doing that you were leaving a large percentage of the population of the county in Commissioners Precinct No. 1.

A. Yes, there's still a large part of it in there, yes, sir.

Q. And you knew that you were leaving a vast majority of the qualified voters in Commissioners Precinct No. 1.

A. Yes, sir.

Q. You knew all those facts.

A. Yes, sir.

Q. Population just wasn't a consideration in the sub-
[fol. 386] mission of this plan by you and your vote for its adoption.

A. Yes, population was. Population isn't the only thing you look at.

Q. All right, but population wasn't really a factor, was it, with you?

A. Well, it is one of them that you have to consider.

Q. But you didn't consider it very strongly because you just testified that a vast majority of the people lived up there in Commissioners Precinct—

Mr. Browder: Your Honor, I object to that as argumentative. He said, "You didn't consider it very strongly because" many of the people are there. Now that—

The Court: I sustain the objection.

Q. All right, tell us just to what extent this population distribution of the county was a factor in your consideration and your proposal and your vote for this plan.

A. Well, from my—I travel all four every week and sometimes I am over it twice a week. Well, I knew one little area that it would take in up there and the roads, area, and tax value, and took in about—it's about doubled its population.

Q. About what?

A. About doubled it.

Q. When you moved the boundaries of Commissioners [fol. 387] Precinct 4 over there, from the red to the green line, you about doubled the population of Commissioners Precinct 4? Is that your testimony?

A. I never have count it exact, but roughly thinking about it, it wouldn't miss it far either way.

Q. All right, what would you say the population is out there in the commissioners precinct right now, Commissioners Precinct 4 at the present time?

A. I never did count them.

Q. Well, do you have any idea?

A. Not very close.

Q. What is your best estimate?

A. What you mean "best estimate"?

Q. Well, based on your knowledge of the people out there —you say you travel it frequently—how many people do you think now reside in Commissioners Precinct 4 since the change?

A. Well, I'd have to do a little figuring for you there in counting them.

Q. Would you say 500?

A. No, more than that.

Q. 600?

A. No, more than that.

Q. Well, how many?

A. I told you I didn't know.

[fol. 388] Q. A thousand?

A. There is over a thousand.

Q. Over 2,000?

A. No, I don't believe there's 2,000.

Q. How about 1500?

A. Well, if you want to split the difference there, that might be about it.

Q. You don't really know.

A. Not exactly.

Q. But you testified the population was a big factor in your consideration in dividing the county.

Mr. Browder: Now, wait just a minute. Let us keep this straight. I object to that, your Honor, because I don't believe he said that population was a big factor.

The Court: I sustain the objection.

Q. All right, did you or did you not testify that population was a factor—

A. That's one of them.

Q. —in the division of the county?

A. That's one thing you consider.

Q. All right, let's talk about that one for a while. How many people live over there in Commissioners Precinct 2 as it exists now?

A. I don't know. He can tell you that.

[fol. 389] Q. How about County Commissioners Precinct No. 3?

A. He could tell you that better than I could.

Q. You don't know?

A. No.

Q. You are not sure over in Commissioners Precinct No. 4?

A. Not exactly.

Q. How about Commissioners Precinct No. 1?

A. Not exactly.

Q. Well, how many would you say? Do you have any idea?

A. I wouldn't even attempt to guess at it.

Q. So you don't know now—

A. I can get those figures.

Q. Did you know back in August 1963?

A. Not exactly, but I could get those together for you.

Q. That was the extent you considered population then. You just didn't know but it was a factor.

A. Well, that's just one of the things that you talk about.

Q. All right, we are talking about that right now, Mr. Osborne. If you will, I would like to refer you over there to Plaintiff's Exhibit No. 32, down on the floor, and I believe that has been identified as the proposals submitted to the commissioners court by Mr. Hank Avery in July or [fol. 390] August of 1963 prior to the time you adopted the Order dividing the commissioners precincts. Now, based on your knowledge of the county, under that plan would you not say that there was a substantially equal distribution of the people in the county into the four commissioners precincts?

A. It might have done something to population.

Q. Well, it is about equal, isn't it, based on your knowledge of the population of the county?

A. It split the town right in the middle two ways, up and down.

Q. That's where all the people live, isn't it?

A. Yes, sir.

Q. All right, would you say that there was a fairly equal distribution between those four commissioners precincts as to value of property?

A. The way that is cut up there, I don't know. It would take a lot of study to figure the values there.

Q. Well, does it—

A. It is zigzagged. It would be a lot of confusion.

Q. You don't know?

A. Know what?

Q. Whether it would or would not be a fairly equal distribution of the property values of the county.

A. Well, I don't believe it would be.

[fol. 391] Q. All right, in making the division of the county that you submitted and that was adopted, did you take into consideration the property values in the county?

A. Well, each one pretty well knows what he's got, and we did consider it, yes, sir.

Q. Sir?

A. And we did consider it.

Q. Did you make a study of it?

A. No, we didn't just hire an engineer and sit down and value the whole thing.

Q. You didn't talk to anybody, you just took into account what you thought you knew about it. Is that right?

A. We talk to people every day.

Q. I am talking about value; I'm not talking about people.

A. We just didn't see the idea of spending the money that it would take to get somebody to come in here and study the whole thing out.

Q. So you really—

A. From what knowledge we had of our own of what each man's own values and everything, why,—

Q. So you really didn't consider values, then, in submitting and voting for this plan that you submitted back in August of 1963.

[fol. 392] A. Yes, sir, values were considered.

Q. But you testify you didn't make a study of those values.

A. I don't guess we did make a study if you wanted an engineer's report on it, and everything.

Mr. Olson: Pass the witness.

* * * * * * *

[fol. 400] Redirect examination.

By Mr. Olson:

Q. Mr. Osborne, you testified that, as a county commissioner, you represented all of the people of the county.

A. Well, I work wherever they need me. If they need me in Two, well, I got out in Two. We all work together, but I am elected from Four.

Q. I believe you testified that you submitted this plan and you voted for it because you thought it was for the convenience of all the people of the county. Is that right?

A. Yes, sir.

[fol. 401] Q. Do you think it is convenient for the people of Commissioners Precinct No. 1, containing many, many times the number of people in all of the other commissioners precincts combined, to be represented by one member on the commissioners court, and the small number of people to be represented by three? Do you regard that as convenient?

A. Yes, sir.

Q. Will you tell us why?

A. Well, talk about roads; I think that a man who is out here with them and on them and has to travel them to go to town, no other way to get in but that, well, I think he has more knowledge of what is going on out there, and, when he has got the problems that come up out there among his people, why, he's right there with them.

Q. And you give more regard to roads than you do to people?

Mr. Browder: Now wait. Your Honor, I object to counsel interrupting him unless he is through, and it didn't appear to me that he was.

Q. I beg your pardon, Mr. Osborne, if you weren't. Were you through?

A. Well, I am not right sure where I was.

Q. All right, we will try to start again. You think it is more important to consider roads than consider people. [fol. 402] Is that your testimony?

A. No, I don't think you forget people, but people is just one thing that is considered in this. Roads is our big item.

Q. But you do consider it convenient for the people to have the vast majority of the people of Midland County

in one small commissioners precinct, represented by one member on the commissioners court. Is that correct?

A. Now state that again.

Q. Do you consider it convenient for the vast majority of the people of Midland County to reside in Commissioners Precinct No. 1, to be represented by one member of the commissioners court?

A. Well, I don't see that there is inconvenience.

Q. All right. Now referring you over there to Mr. Avery's plan again, Plaintiff's Exhibit No. 32, a minute ago you testified about city commissioners and county commissioners. Just because the city and the county might divide it, as suggested by Mr. Avery there, wouldn't preclude you residing out on Highway 80 there from being elected commissioner from that precinct, would it?

A. Yes, I believe it would.

Q. You would be eligible for the office, wouldn't you?

A. I'd be eligible, but you'd never get there.

[fol. 403] Q. And if you could convince the people you were the best man, you would probably be elected, wouldn't you?

A. I don't believe you'd ever get there from out there. We have had a little taste of that.

Mr. Browder: Now, your Honor, I resubmit the question I asked. I asked your Honor to take the question and the answer. That is right in line with what I gave. Without going back into it, I just ask you to take cognizance of it.

The Court: I believe the answer was unresponsive to the question.

Mr. Browder: I think it was just as responsible as it could be and, your Honor, I submit to you it was because the question was "Could you be elected if you lived in the country?" The witness said you couldn't and I know you couldn't and the only testimony before you is that you couldn't.

Mr. Olson: If it please the Court, counsel is not under oath whether he knows he could or whether he couldn't.

Mr. Browder: Well, the Court is not going to take my statement as testimony.

The Court: All right, if you want to make a motion to strike that phase of it, I will—

Mr. Browder: (Interrupting.) I don't. I asked your [fol. 404] Honor if he is going to ask the question and if it is to be held admissible for the plaintiff, then let us both—

The Court: (Interrupting.) Are you objecting to the question?

Mr. Browder: No, sir. No, sir, I think it is admissible. I would just like to ask the same question, your Honor.

Q. I believe you testified, Mr. Osborne, that you felt like, before this Order was adopted, something needed to be done about realigning the commissioners precincts in Midland County. Is that correct?

A. Did I realize that something should be done?

Q. My recollection is that your testimony was that you felt like something should be done to realign the commissioners precincts of the county prior to the time you did so in August of 1963.

A. Well, we didn't know it until we had those hearings. That was the purpose of the hearings, to see what the people—see if they still wanted it, so we had them.

Mr. Olson: That is all.

* * * * * * *

[fol. 534] ALVEY BRYANT, one of the defendants, after first being duly sworn, testified as follows:

* * * * * * *

[fol. 564] Cross examination.

By Mr. Olson:

Q. What is your educational background, please, sir?

A. High school.

Q. Where did you graduate from high school?

A. It was known then as Prairie Lee.

Q. Sir?

A. Prairie Lee was what it was known then as. It is known now as Greenwood.

Q. All right. When did you graduate from high school, Mr. Bryant?

A. 1933.

Q. 1936?

A. '33.

[fol. 565] Q. And you have been a county commissioner how long?

A. Since 1951, January.

Q. Prior to the time you became county commissioner, did you have any special training or education in road work, road construction, road designing and road maintenance?

A. Not roads. I did equipment and engines. Before the war I went to San Antonio and went to school five nights a week, three nights three hours per night, and got what we called then a degree in aircraft engine repair. During the war I was in charge, foreman, of the engine installation, in direct charge of all the engines on Midland Army Airfield, or what is now known as Terminal, Texas. That was during the war.

Q. Your training and your experience in road construction and road maintenance, and so forth, has been gained as a county commissioner of Midland County, Texas. Is that correct?

A. The biggest part of it was. Of course, I observed the road work as I lived in the rural area before I was commissioner.

Q. Yes, sir, I understand that. Mr. Bryant, do you recall how many votes you got at the general election in 1962?

A. No, sir, I don't remember exactly.

Q. I have a record before me here that indicates you [fol. 566] received 54 votes. Does that sound about right?

A. What year now?

Q. At the general election in 1962.

A. That's probably right. We didn't have any Republicans to run against us and there was a small vote in the general election.

Q. This information I have also indicates there was a total of 81 votes cast. Does that sound about right?

A. I believe that's right.

Q. Do you recall how many votes you got in the Democratic primary that year?

A. No, sir, I do not.

Q. Was it about 44? Does that sound about right?

A. I would say it is close to right.

Q. Mr. Bryant, you, of course, having been on the commissioners court since 1951 or 1952, you are familiar with all facets of the controversy we are engaged in now over the redividing of the county into commissioners precincts, are you not?

A. Pretty well.

Q. You have attended these various hearings and you have discussed this with other members of the commissioners court, and so forth, over these some 10 or 12 years, have you not?

A. Yes, sir, I have.

[fol. 567] Q. Now, back in September of 1962, you recall that Mr. Avery came before the commissioners court and requested the court at that time to redivide the county into commissioners precincts. You remember that, don't you?

A. He did come before the court and bragged on us very highly for our past work, and then asked us to redistrict the court.

Q. He bragged on you first, you say?

A. Yes, sir.

Q. Have the factors that you took into consideration at that time and subsequently until you adopted this order and what you should consider in redividing the county changed any?

A. State that again, please.

Q. Have the factors to be considered in redividing the county into commissioners precincts changed any from

back in September of '62 up until the time you adopted this Order?

A. Yes, sir, it has.

Q. Would you tell us how?

A. By the study that was made of all the people that appeared at these hearings, their evidence they presented and the reasons why it should or should not be redistricted.

Q. You didn't think those matters were important when the controversy first began. Is that right?

[fol. 568] A. Well, at that particular time the court ourselves had from time to time considered it and weighed the evidence that we knew and the people we talked to had told us, and, of course, any information that you can always obtain is important.

Q. Were you considering all these factors that you outlined this morning even back in '62?

A. No, sir. As I say, we were considering the evidence that the commissioners, ourselves, had and the people we talked to from time to time and mainly the people that we talked to on the redistricting, or that I talked to on the redistricting, were citizens of the city of Midland. I didn't take into consideration anything we had at these hearings back there at that time except maybe some of the same things do come along on the same line of thinking.

Q. The only thing you originally considered is what some of the taxpayers out there told you. Is that right?

A. No, sir. I stated that the commissioners, ourselves, from time to time talked about redistricting Midland County, the pros and cons of what each one of us thought of it, and then I particularly talked to several citizens and friends here in the city about what they thought of redistricting and what they thought I, as a member of court, and how I should vote on redistricting, and 90 percent of [fol. 569] the people I talked to, up until we had the hearings, did reside here in the city of Midland, of my good friends.

Q. Mr. Bryant, isn't it true that on or about September 24, 1962, that you made a statement, the following state-

ment, in the presence of Mr. Cope Routh of Midland, talking about this matter, and you said it would be up to the taxpayers in your district to determine whether the district court lawsuit would be opposed, and then went on to say, talking about redistricting the county, "If we didn't have some big taxpayers in our district, taxpayers who live in Precinct No. 1 backing us, we wouldn't have fought it this long"? You made those statements, did you not?

A. Yes, sir, along those lines of speaking there, not the exact words.

Q. You also said, "I'm going to contact those taxpayers and see what they want to do. I'll see what they want to do. I'll see what they want and that will determine my route."

A. Yes, sir, I did. As I told you previously, I have talked to citizens and taxpayers of Midland County on this subject for the last 10 years.

Q. But you said you were going to contact those big taxpayers in your district who lived over in Precinct 1 and, whatever they wanted to do, that would determine what route you followed.

[fol. 570] A. I didn't say that I would contact the big taxpayers.

Q. But you—

A. I did say, after I talked to taxpayers in Midland County I would then decide which route I wanted to take and how I wanted to vote.

Q. You didn't say, "I'll see what they want and that will determine my route"?

A. I said that I would talk to them and see what they wanted and then I would make my own conclusion and how I wanted to vote in this matter.

Q. All right. Mr. Bryant, I believe that in addition to your occupation as a member of the commissioners court that you are also a farmer and a rancher. Is that correct?

A. Yes, sir.

Q. What size place do you own?

A. I own five sections of land. It is about one section of farm land and about four sections of grass land.

Q. Is it all out in Commissioners Precinct No. 2?

A. Yes, sir.

Q. Now, you testified at some length this morning about the location of the library and courthouse, some county contributions to a memorial hospital, and that all of these things are located in the city of Midland. Is that correct?

A. The county maintenance depot is out in the county.

[fol. 571] Q. But all these other things—

A. The rest of them are in the city limits of Midland.

Q. Well, this is the only city or town or village in the—the only incorporated city, town or village in the county, isn't it?

A. Yes, sir.

Q. And I think it is all agreed here that the vast majority of the people live—the county's population—live in the city of Midland. You agree to that?

A. I think the majority of them do.

Q. Well, it is more than just a majority. You know that, don't you?

A. Well, when you say "majority," that means more people live here than they do outside.

Q. Well, probably 95 percent. You know that, don't you? The census reflects that?

A. Well, I have read and heard on TV and what-have-you that is somewhere around those figures.

Q. Well, my point is, this is the trading center for people in the county, isn't it? They come to Midland to shop.

A. Partly it is, yes, sir.

Q. It wouldn't be very logical to put these libraries and courthouses anywhere else in the county except in the city of Midland, would it?

[fol. 572] A. Well, in the city or just adjacent probably would be the most sensible place to put them.

Q. All your major arteries, roads, and so forth, lead to the city of Midland, too, of course, in the county, do they not?

A. Around Midland they do. Now west, south and east leads to other cities, Stanton, Garden City, Rankin, Odessa. They are the closest. Now—

Q. Those are in other counties, though.

A. No, the roads—

Q. I mean—

A. —in Midland County lead to Stanton, Garden City, Rankin and Odessa.

Q. But my question was those other cities are located in counties other than Midland.

A. Yes, sir.

Q. Now you also testified, I believe, that all elected officials of Midland County, other than the county commissioners of Precincts 2, 3 and 4, lived inside the city of Midland.

A. Yes, sir.

Q. And outside of Commissioner Gideon, who is county commissioner for Precinct 1, those officials are elected county-wide, aren't they?

[fol. 573] A. Yes, sir, they are.

Q. And they can live any place they want to. They live here as a matter of choice, don't they?

A. Yes, sir. That is their privilege of being American citizens.

Q. They can move to any corner of the county if they want to.

A. Yes, sir.

Q. And I believe you testified that a large percentage of the county employees live in Commissioners Precinct 1 and specifically within the city of Midland, did you not?

A. Most of them live within the city limits of Midland.

Q. You don't have any residential requirements for your employees, do you, the county employees?

A. No, sir. Probably the requirement that they do live in Midland County.

Q. Right, but anywhere in Midland County.

A. Yes, sir.

Q. They live in the city of Midland as a matter of choice.

A. The ones who live here do, I am sure.

Q. If they want to move outside any place in the county, well, it is not going to jeopardize their job.

A. Sure not, as long as they are in Midland County.

Q. I believe Mr. Pannill, defendants' counsel, asked you [fol. 574] to look at one of the defendants' exhibits, which was an audit for 1961, I believe. Do you know where the audit for 1962 is and the audit for 1963?

A. Yes, sir.

Q. Would that be in the county auditor's office?

A. Yes, sir.

Q. Thank you. Regarding the right-of-way for U. S. Highway 80 running through the city of Midland, I believe you said you purchased some right-of-way. Is that correct?

A. For what we called it at that time, it was known as the bus and truck by-pass route for Midland, and—

Q. And the county—

Mr. Browder: Wait just a minute. Let him finish his answer. Now they did that the other day and now they are doing it again.

The Court: Let him finish, Mr. Olson.

Mr. Browder: Now, your Honor, I do make the same objection.

The Court: Sustained.

Mr. Browder: Thank you, sir.

Q. Excuse me, Mr. Bryant. Go ahead.

The Witness (to the Court): Can I answer the question, Judge?

The Court: Yes.

[fol. 575] A. Midland County did purchase the right-of-way to widen Highway 80 plumb through Midland, and that means now the only existing right-of-way—we did buy right-of-way to widen it plumb through the county. That means plumb through the city limits. Then we did purchase the right-of-way and paid for it for what we call

the bus and truck by-pass through the city limits of Midland.

Q. All right. Now my question, Mr. Bryant, the thing I was really getting to: was it your testimony this morning that you used bond funds for this purpose?

A. Yes, sir.

Q. Now I believe it was earlier testimony in this trial that the county did not have any part of its county road system, maintain any roads, or anything, inside the city limits of the city of Midland. Is that correct?

A. That's correct. We don't maintain any.

Q. And all of your Road and Bridge Fund is used for building and repairing and widening and constructing the county road system in and about the county. Is that not true?

A. Yes, sir, that's correct.

Q. And none of those funds are expended within the corporate limits of the city of Midland.

A. No, sir, they're not. Pardon me, now. The bonds that we vote is for specific, as I said, go through the city [fol. 576] limits here of Highway 80. Well, that's road bonds that's voted, and it is spent and paid for in widening this Highway 80 and buying the right-of-way for your by-pass truck route. That come out of road and bridge funds.

Q. I understood you to say that those were bond funds.

A. They are bond funds, but you have to pay for them out of your road and bridge by taxation. Later on we retire these bonds.

Q. Well, I understand that. Roughly, if you don't recall the exact figures, what is the amount of your Road and Bridge Fund on an annual basis?

A. About $360,000.

Q. That is raised largely by taxes on real property, real and personal property, in the county of Midland.

A. Yes, sir.

Q. You get a little from the state, I believe.

A. Yes, sir, we get some money from the state and some return money on our license plates that were sold here in the county, gasoline tax.

Q. That was $360,000?

A. I just said roughly; you asked me roughly; around $360,000.

Q. The point I wanted to establish, that on this right-of-way through the city here, that was purchased with bond [fol. 577] funds voted by the people, all the people, of Midland County.

A. That's correct.

Q. Whereas your county road system is maintained by taxes that are assessed by the commissioners court and collected by the county tax assessor. There is no vote on that. Isn't that right?

A. That's correct. Vote by the commissioners court.

Q. You testified about the various factors you considered prior to the time you passed this Order, Mr. Bryant, back in August of 1963, and you made great emphasis on road maintenance and construction, and so forth. I believe you also testified that you gave some consideration to population, or did you testify in that fashion?

A. I don't really remember whether I did or not, but if I didn't I intended to. I really think I did.

Q. Well, would you consider that a major factor in your consideration, the distribution of population between commissioners precincts?

A. No, sir, I wouldn't consider that as a major in redistricting a county.

Q. Well, obviously, the manner in which the population is distributed, it was a very minor factor in your consideration, was it not?

A. I wouldn't say it was a minor factor. We had lots [fol. 578] and lots of factors and started out and started over and stopped lots of times on this redistricting before we finally voted.

Q. But, obviously, the way the population is distributed, you didn't think it was important at all to have it dis-

tributed more equally among the commissioners precincts. Is that not true?

A. If I understood your question—state your question again.

Q. My question is, as I recall it, Mr. Bryant: you didn't consider it really important to distribute this population kind of equally among the commissioners precincts, did you?

A. Yes, sir, I sure did.

Q. You did?

A. Yes, sir.

Q. Well, how can you explain the fact that you kept all of it in Commissioners Precinct 1?

A. Every elected official by the people holding an elected office in Midland County today, and it has been way back for years, has been elected by the people that live here in the city limits of Midland. In other words, the people all over the county elected live here in this county are elected by numerous, numerous, numerous people representing the people of Midland here in Midland County. The urban and [fol. 579] rural people are represented by three elected officials, and I think, population-wise, considering how many people here elect and how many in the small rural areas elect, I don't think as it is today that it is out of proportion.

Q. I understand all that, Mr. Bryant.

A. I was just stating the facts as I see them.

Q. Sir?

A. I was just stating the facts as I see them about the fairness to population by the people that people of Midland County elect as their elected officials and the people in different areas being fairly represented in different parts by elected officials of Midland County.

Q. Well, I understand that, Mr. Bryant, but that wasn't exactly what I asked, I don't—

A. That's what I took into consideration when I voted redistricting, remembering the population.

Q. You took into account then that people like the District Judge and the sheriff and tax assessor-collector were elected by the county at large, and you thought that was all the representation those people needed. You didn't think it was necessary to have a somewhat equal distribution of the population among the commissioners precincts.

A. I don't ever consider just one factor. I consider the overall picture and the people in the rural areas need [fol. 580] someone to represent them and the people in the city, taking everything as a whole, is fairly represented, and I think as of today the people in the rural are fairly represented.

Q. All right, sir. Now referring you there, Mr. Bryant, to Defendants' Exhibit 4, the map or plat on the right-hand portion which I believe is the same as Plaintiff's Exhibit No. 32; anyway, it is the plan submitted by Mr. Hank Avery. You will acknowledge, will you not, that had that plan been put into effect there would have been a substantially equal distribution of the population of the county among the four commissioners precincts?

A. It would have been pretty well equal as far as the mileage and the population, but you would put all of the representation that Midland County would have all living up here in the city limits. The other areas wouldn't have any representation at all. I'm just looking at that there. I haven't went over it to see that there is anything accurate the way he has drawed it off, but it looks pretty well.

Q. Excuse me, Mr. Bryant..

A. Pardon me, go ahead. I was through.

Q. You would also have a substantial equal distribution of a number of qualified voters of the county, would you not?

A. I couldn't honestly answer your question, because I don't know where the people live. You can drive around [fol. 581] town but you can't tell where most of them do live.

Q. You would also have generally an equal distribution of the tax values of the county among the four commissioners precincts under the Avery plan, would you not?

A. I didn't make a study to see really accurate on that to really answer your question.

Q. Now, Mr. Bryant, assuming for a moment that that plan were in effect, Mr. Avery's plan or suggestion, you would reside in commissioners precinct there as you so now, would you not?

A. Yes, sir.

Q. And there is nothing in the world, no legal reason, why you couldn't run and be elected as commissioner of Precinct No. 2, is there? It would be up to the voters of that district to make that determination, would it not?

A. Well, it has always, yes, sir, up to the voters.

Q. All right, sir. If the people wanted you, they would elect you, wouldn't they?

A. If the majority in that precinct wanted you, they would elect you.

Q. I believe you said this morning that you couldn't recall an occasion on the commissioners court when the county judge or the commissioner of Precinct 1 came up with a plan or a proposal or suggestion where the three [fol. 582] other commissioners opposed or rejected them on what they might want.

A. As I remember, that was partly my statement. I think I intended to add "for the betterment of Midland County."

Q. Also,—

A. I know different instances that we have voted and that was redistricting.

Q. So regardless of what the county judge may have come up with or the commissioner of Precinct No. 1, if the other three of you thought it was for the betterment of Midland County, you went along with it; if you didn't you blocked it.

A. We don't, never have, since I've been commissioner, the three rural commissioners have never got together and

agreed to block anything. If any proposition is offered to us, we vote as we individually see fit.

Q. I understand that, Mr. Bryant, and I certainly didn't mean to imply—

A. We have voted against redistricting, if that is your question, yes, sir.

Q. I want to get to a couple of questions on that. Isn't it true that back in the fall of 1962 that Commissioner Gideon made a motion that the county be divided into commissioners precincts according to substantial numerical equality?

A. Mr. Gideon did make motions at different times to redistrict Midland County, but until we had our hearings I [fol. 583] have never known of him coming up with a specific plan.

Q. Do you recall that motion I refer to?

A. Yes, sir. He has.

Mr. Pannill: Your Honor, I am going to interpose an objection here about the Best Evidence Rule or that they produce the minutes, because, if they are thinking about the one I am thinking about, they are not stating it according to the minutes. I would appreciate it if we could get the minutes of that meeting.

Mr. Olson: He answered the question, your Honor.

The Court: What was the question again? I missed it.

Mr. Olson: Your Honor, as I recall the question, it was whether Mr. Bryant recalled Commissioner Gideon making a motion back in the fall of 1962 that the county be divided into commissioners precincts according to substantial numerical equality.

The Court: Do you object to the question?

Mr. Pannill: I object to the question on the ground that the minutes of that meeting are the best evidence of what took place, and that they are official records and this witness can not go behind it.

The Court: Sustain the objection.

Q. I believe you did answer that you did recall such a [fol. 584] motion, Mr. Bryant.

A. Mr. Gideon made a motion that we redistrict Midland County, but he didn't have a map, he didn't have specific plans, of just how he would redistrict it. He made a motion, as I remember it, to redistrict.

Q. According to substantial numerical equality.

A. The way I remember it, he did not put that in there. He made the motion to redistrict Midland County, and I have never known of him coming up with any specific plan or recommendation, until we had our hearings, on how to do it according to anything.

Q. You testified this morning that Judge Noel Cason, who was county judge before Judge Culver, often advocated the redistricting plan whereby the city would be divided between two commissioners precincts.

A. Yes, sir.

Q. I believe you also testified that you were always opposed to that.

A. I don't know whether I testified I was against that plan or not. I don't remember it.

Q. Well,—

A. I did say it was never brought to a vote of the commissioners court while Judge Cason was in office to vote on his plan on this two and two route. I never did vote for it; [fol. 585] I never did vote against it while he was in office. It never came up for a vote.

Q. Well, later, Mr. Gideon—it is in the record here as an exhibit. I have forgotten the number, but he did submit a plan back in August of 1963 substantially the same for a division of the county whereby the city would be divided between two commissioners precincts.

A. Yes, sir, he did.

Q. You were opposed to that plan?

A. Well, he made the motion and it died for the lack of a second. I didn't vote for it or I didn't vote against it.

Mr. Olson: No further questions.

* * * * * * *

[fol. 601] Recross examination.

By Mr. Olson:

Q. Mr. Bryant, I wonder if I can see those things you were looking at there on value.

A. I beg you could. Which one do you want first?

Q. It doesn't matter. I would like to see both of them, if I may.

[fol. 602] A. There's your square miles and that's your roads. (Handing documents to counsel.) That's just a rough, pencilled notation.

Q. Before we get into that, Mr. Bryant, let me get back just a minute on this right-of-way inside the city and the Big Spring Street underpass, I believe you called it, and so forth, and you said your annual interest in sinking fund requirements were paid out of the Road and Bridge Fund of the county. Is that correct?

A. Yes, sir, I believe that's correct.

Q. Could you tell me the current annual principal and interest fund requirements for that bond issue?

A. There are several different bond issues and I can't say just offhand. I can go to the auditor's office and get it for you, but I just couldn't tell you.

Q. Do you have any idea in just general round figures, like ten thousand dollars a year or twenty, or what?

A. I couldn't give you anything that would be close to correct just on those different bond issues.

Q. I wonder if during the next recess you would mind getting that record for us.

A. If you will write on a piece of paper just what you want, well, I think I could get them for you.

Q. What I want, and I'll just tell you now, is your annual [fol. 603] interest and sinking fund requirements to retire the bond proceeds that were expended on the right-of-way acquisition for U. S. Highway 80, and the construction of this Big Spring Street or road or highway underpass.

A. If you would write your request, I would give it to the auditor and I am sure she would get it for you.

Q. Well, just suppose you bring us the audits for those years. Would you do that?

Mr. Pannill: May we approach the bench?

The Court: Yes.

(Counsel go to the bench and confer with the Court and then take their respective seats.)

Q. All right, Mr. Bryant,—

A. Could I ask you a question?

Q. Sir?

A. Could I ask you a question, Judge?

The Court (to witness): Not now you can't. You can later.

Q. Now I don't mean to belabor this point and, if I am, you say so and I'll get off of it, but what I am interested in, Mr. Bryant, is percentages or in dollars. You have testified that your annual Road and Bridge Fund budget is about $360,000, I believe, and I just wondered if you [fol. 604] could tell me would it be 5 percent or 10 or 15, something of a general nature, as to what portion of that $360,000 is used for retiring these bond funds that were used for this right-of-way and underpass.

A. I couldn't give you the exact, but the county auditor would be glad to bring it to you and read it; in other words, give it to you, I am sure.

Q. All right, sir.

A. That was the question I wanted to ask you, just let her bring it.

Q. You did testify that you had an audit for 1962 and 1963, did you not?

A. Yes, sir, we have an audit each year.

Q. Do they provide the members of the commissioners court with a copy of that audit?

A. Yes, sir.

Q. Do you have a copy?

A. I do at home.

Q. Now you stated in response to counsel's question a minute ago that you felt like you must have rural representation on the commissioners court. Is that correct?

A. That's correct.

Q. Do you feel like you must have, that a majority of the commissioners court must be composed of rural repre-
[fol. 605] sentation?

A. Yes, sir, I do.

Q. And you feel that the only way you can get that majority representation of rural interest on the commissioners court is to divide the county into commissioners precincts, placing the vast majority of the people and qualified voters into one commissioners precinct segregated from the others. Is that correct?

A. Yes, sir, that's correct.

Q. Do you have a constable in your precinct?

A. No, sir.

Q. Do you have a justice of the peace?

A. No, sir, I don't.

Q. You testified as to your memory, you having recalled a matter you forgot to testify about this morning, on what you considered before you voted for the adoption of this order of August 31, 1963, and you said that one thing you took into consideration was the value of personal property in Commissioners Precincts 1, 2, 3 and 4, that this information was prepared by you, prepared for you, by Pritchard & Abbott.

A. I don't remember saying that this morning, sir.

Q. I thought a minute ago that you said these figures you got from Pritchard & Abbott.

[fol. 606] A. I didn't say that I got them from Pritchard & Abbott. Actually, Louis Osborne got them from Pritchard & Abbott and I got them from Louis Osborne. I did weigh those figures when I voted to redistrict Midland County.

Q. When did Mr. Osborne get these figures from Pritchard & Abbott?

A. I don't really know.

Q. When did you get them from Mr. Osborne?

A. I got that particular sheet of paper from him there and—

Q. But you had this information—

Mr. Pannill: Let him answer the question.

Mr. Olson: I am sorry.

A. I got that particular sheet of paper there from him yesterday, but I had saw figures on valuations before.

Q. All right, sir. You considered these figures in your consideration of the adoption of this order of the commissioners court. Did you also obtain and consider figures of value on real property in the various commissioners precincts?

A. I have checked those as I saw them from time to time and I took that into consideration along with this with all those other things when I did vote.

Q. Did you get those figures from Mr. Dean, who testi- [fol. 607] fied here yesterday?

A. Now I have saw figures on different occasions in Mr. Speed's office and some on tax equalization day when—or before tax equalization day we would call him and ask him what it looked like our values would be next year.

Q. It is your testimony that you also obtained and considered figures of the value of real property in these four commissioners precincts.

A. I considered all types of property along with the other things that I considered when we voted.

Q. All right, do you remember approximately what those figures were, the value of real property in the four commissioners precincts?

A. No, sir, I don't know anywhere close to it what they were.

Q. Do you have that information?

A. No, sir, I don't at this time.

Q. Do you suppose you could get it during a recess and bring it back so we can get that in the record, too, along with this?

A. I don't much believe I could during recess. In other words, I don't know whether I care about getting you the information you are wanting like that or not.

Q. You—

[fol. 608] A. If I had had a day or two, well, I wouldn't have minded working it up for you or anyone else, but on a recess I just don't think I could do it.

Q. You mean you just rather not have those figures in the record of this trial.

A. If we had a day or two, I would be glad to get them for anybody. In other words, the Judge, if he wanted any record, I would be more than happy to obtain them for him and be happy for him to check them in any way he sees fit. I have nothing to hide, whatsoever, but as far as recess, I'm a little bit tired and about half confused and I just couldn't get them for you during recess.

The Court: You want a recess now, Mr. Bryant?

The Witness: No, sir, go right ahead. I want to get this over with.

Q. All right, Mr. Bryant, you do know, of course, the large percentage of those real estate values are located in Commissioners Precinct No. 1.

A. Real estate, I do, yes, sir.

Q. Now you said that before you voted on this order and as you considered it, dividing the county into commissioners precincts back in August of 1963, that you figured up the miles of road and the total land area, and you took into account these figures on personal property values in the [fol. 609] commissioners precincts. Did you get together any figures on population?

A. We didn't get together any figures. We knew that they come and go and move here and move there and change from time to time. We didn't get any accurate population figures together, no, sir.

Q. Did you get together any figures on qualified voters by precincts?

A. We assumed that the reports that we read in our paper was somewhere correct of the people that paid a poll tax. That don't mean the people; that means the ones who paid their poll taxes would be eligible to vote.

Q. But you didn't get together any figures on population nor qualified voters?

A. No, sir, we thought that we could go by the records, and we were thinking about that when we redistricted it. In other words, closer than that. We didn't get the exact number.

Q. Mr. Bryant, I am going to hand you these things back here now that I got from you, and I have one or two questions I would like to ask you regarding the miles of road by precincts that you testified to. It may have been that I misunderstood you, but would you call out again—well, let me just ask you this: I understood you to say [fol. 610] that there were 140 miles of road in Commissioners Precinct No. 2. Now the information we have and that Mr. Schumann testified to was 114 miles of road.

A. You misunderstood me because it is wrote right here, —68 miles, 1; 114, 2; 84 in 3; Precinct 4, 79 miles.

Q. All right, thank you. That conforms with what I had, and I did misunderstand you.

Mr. Olson: I don't believe we have any further questions.

Mr. Pannill: That is all, Mr. Bryant.

* * * * * * *

[fol. 345]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

142ND JUDICIAL DISTRICT

No. 18,018

HANK AVERY, Plaintiff,

v.

EDWARD N. GIDEON, et al., Defendants.

JUDGMENT—Entered September 11, 1964 and filed September 14, 1964

On the 18th day of May, 1964, came on to be heard the above numbered and entitled cause, wherein Hank Avery is Plaintiff and the Commissioners' Court of Midland County, Texas, comprised of Edward N. Gideon, Commissioner of Precinct No. 1, Alvey A. Bryant, Commissioner of Precinct No. 2, Clark Moreland, Commissioner of Precinct No. 3, Louis Osborne, Commissioner of Precinct No. 4, and Barbara G. Culver, County Judge, and Midland County, Texas, are Defendants, and came the parties in person and by their respective attorneys and announced ready for trial. All matters of fact and of law were submitted to the Court without the intervention of a jury, and the pleadings, the evidence, and argument of counsel were heard by the Court.

It appears to the Court and the Court finds that on the 31st day of August, 1963, the Defendants Gideon, Bryant, Moreland, and Osborne, constituting and acting as members of the Commissioners' Court of Midland County, Texas, passed and approved an Order of said Commissioners' Court dividing and redistricting said County into four new Commissioners' Precincts, designated as Commissioners' Precincts Nos. 1, 2, 3, and 4, the boundaries of said new Commissioners' Precincts to become effective on the 1st day of January, 1964. Further, that on the date of such

Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining popula-
[fol. 346] tion of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The Court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters prepared and maintained by the County Tax Assessor-Collector resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County. The Court further finds that at all times relevant to the matters in controversy these facts were well known to the Defendants.

The Court further finds that the division effected by the Order of August 31, 1963, made only insignificant changes in the Commissioners' Precincts as they existed prior to such Order and that substantially the same conditions and disparities, particularly as to the distribution of population and qualified voters, would have existed on such date and at such other relevant times under all prior divisions of said County into Commissioners' Precincts.

The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants, Gideon, [fol. 347] Bryant, Moreland, and Osborne did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting a division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the principal purposes of the Defendants Gideon, Bryant, Moreland, and Osborne, or a majority thereof, in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect a majority of the members of the Commissioners' Court of said County.

The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County into new Commissioners' Precincts by the Order of August 31, 1963, was not for the convenience of the people of Midland County, Texas, as required by Article 5, Section 18 of the Constitution of the State of Texas.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that the Order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

It Is Further Ordered, Adjudged and Decreed by the [fol. 348] Court that not later than the next succeeding July or August term of the Commissioners' Court of Midland County, Texas, that said Commissioners' Court, comprised of the Defendants Gideon, Bryant, Moreland, Osborne, and Culver, divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people.

It Is Further Ordered, Adjudged, and Decreed by the Court that all costs herein be assessed against the Defendants.

It Is Further Ordered, Adjudged, and Decreed by the Court that all other relief prayed for by all parties is denied.

To all of which action the Defendants Bryant, Moreland and Osborne duly excepted and gave notice of appeal to the Court of Civil Appeals for the 8th Supreme Judicial District of Texas at El Paso, Texas.

Entered this the 11th day of September, 1964.

JOE DIBRELL, Judge Presiding.

[fol. 349] [File endorsement omitted.]

[fol. 350]

IN THE COURT OF CIVIL APPEALS

EL PASO

No. 5745

Appeal from the District Court of
Midland County

MIDLAND COUNTY, TEXAS, et al., Appellants,

—VS—

HANK AVERY, Appellee.

OPINION—December 8, 1965

This is a county commissioners' precinct redistricting case, appealed from the judgment of the District Court of Midland County, Texas. Avery, appellee here, brought the suit as a resident property owner, tax payer and qualified voter of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas, "individually and on behalf of other persons similarly situated and qualified" against the County of Midland and its county judge and four county commissioners, appellants here. Plaintiff-appellee's pleadings reflect that, since the time of its incorporation in 1901, the City of Midland, lying virtually in its entirety in Commissioners' Precinct No. 1, has been the only incorporated city, town or village in Midland County. The city's population had grown through the years until at the time of the 1960 Federal Decennial Census its population represented 92.48 per cent of the population of the county, and Precinct No. 1 contained 97.80 per cent of the population of the county. Of the qualified voters of the county in that year, 97.88 per cent resided in Precinct No. 1. Plaintiff asserted that other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of county

funds and revenue, etc., were disproportionately distributed among the commissioners' precincts of the county, making the precincts as established "grossly impractical and inconvenient to the people". In September, 1962, plaintiff petitioned the Commissioners' Court for a redistricting of the county's precincts, but "such petition and request [fol. 351] was refused". In that same month this suit was filed to compel a redistricting, invoking the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution. During the pendency of this suit, and in July and August, 1963, public hearings were held by the Commissioners' Court on the matter of redistricting the county, during which time plaintiff and others testified or presented plans for such redistricting. On August 31, 1963, plaintiff's pleadings relate, the Commissioners' Court adopted an order, effective January 1, 1964, redistricting Midland County into commissioners' precincts, which order, plaintiff alleges, made only insignificant changes in the boundaries of commissioners' precincts and in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of county roads and other pertinent things among the commissioners' precincts of said county; that in passing said order the commissioners had acted arbitrarily and capriciously, in abuse of their discretion and without regard to the convenience of the people of Midland County or the rights, privileges and guarantees of plaintiff and others similarly situated by the Constitution of the State of Texas and of the United States. Plaintiff prayed that such order of the Commissioners' Court of August 31, 1963 and all prior orders dividing Midland County into commissioners' precincts be set aside and that writ of mandamus issue compelling the defendants to pass a new order giving proper consideration to equality of population and the other factors said by plaintiff to be pertinent in the division of the county into commissioners' precincts.

The presiding judge, who heard the cause without the intervention of a jury, found that Precinct No. 1 had in excess of 95 per cent of the total population of the county [fol. 352] under the order of August 31, 1963, and that on the date of such order over 97 per cent of the qualified voters of the county resided in said Precinct No. 1, and that there was a gross disparity of other pertinent factors, such as land area and taxable values in said order as in all previous orders dividing said county into commissioners' precincts; that in passing such order of August 31st the defendants had acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully, in gross abuse of their discretion, and that their action constituted invidious discrimination. The court's judgment further found that the said order was not for the convenience of the people of said county as required by Article V, § 18 of the Constitution of the State of Texas. The judgment of the court set aside said order and all previous orders dividing the county into commissioners' precincts, and ordered that the Commissioners' Court, not later than the next succeeding July or August term of said court, "divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each *will have substantially the same number of people*". (Emphasis supplied).

Appellant Commissioners advanced twelve points of error and appellant Midland County presented two points of error attacking the District Court's order as above set out. We deem it unnecessary to discuss these points separately or at length, but will treat only those assignments which relate to that part of the order underscored above which embodies the mandatory requirement that the county be divided into precincts so that each would have substantially the same number of people. We are in accord with the assertion by appellant Commissioners that "neither the Constitution of the United States nor the Constitution of Texas, as construed and interpreted by the courts, contains any requirement that county commissioners precincts be equal to each other in population . . ."

Article IV, § 4 of the United States Constitution merely [fol. 353] provides that "The United States shall guarantee to every State in this Union a Republican Form of Government . . .". Amendment XIV, section 1 provides: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article V, § 8 of the Texas Constitution provides that the district courts "shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; . . ."; and § 18 of the same Article relates to commissioners' precincts:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner . . . The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed . . ."

Among the scant authority in Texas on the subject of establishment of commissioners' precincts is to be found the 1932 opinion of this court in Lewis v. Harris, 48 S.W.2d 730, in which a writ of error was refused. This was a redistricting case which arose in Upton County, and we find the facts involved and the language employed so nearly applicable to the case before us as to justify quotation therefrom at some length. The court states:

". . . Appellants cite section 18, art. 5, of the State Constitution which, in substance, requires the division of the county 'from time to time, for the convenience of the people, into precincts,' and that the commissioners' precincts shall be four in number.

"Disregarding legal conclusions stated therein, the petition here simply shows a state of facts which gives [fol. 354] to the town of Rankin and precincts Nos. 1, 2, and 3 a power of control over the commissioners' court of the county out of proportion to their population, voting strength, and taxable values, thereby denying to the town of McCamey and precinct No. 4 the representation upon the court and power of control to which such town and precinct is justly entitled by the population, voting strength, and taxable values thereof.

"As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution, may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations. This is what the present action seeks to compel. The location of cities and towns in certain counties is no doubt such that it cannot be conveniently done. From a political viewpoint it is desirable and just that the precincts should be so arranged, but in some instances it is doubtless not practical.

"It is not alleged that a redivision of the county as sought is practical and convenient for the people. Plaintiffs simply base their demand upon population, voting strength, and taxable valuation. The present division is inconvenient in the sense only that the town of McCamey and precinct No. 4 have not the

representation upon and control of the commissioners' court to which the plaintiffs say such town and precinct are justly entitled by the population, voting strength, and taxable valuation thereof.

"There is no law imposing upon a commissioners' court the duty of rearranging the commissioners' precincts of a county upon such a basis, and the writ of mandamus will not lie to compel such action. The demurrers were properly sustained."

The cited case is given recognition in Hatter v. Worst, 390 S.W.2d 293 (Tex. Civ. App., 1965; n.r.e.), although Lewis v. Harris was not controlling on the issue involved in the latter case. An analytical and well-documented discussion of the case now before us is to be found in the Winter, 1965 issue of the Baylor Law Review, Vol. XVII, No. 1, p. 41, written by J. William Davis, which it would be well for the reader of this opinion to review for additional background information on the case before us.

We have come to the conclusion that the judgment of the lower court in the instant case must be reversed. It [fol. 355] has been stated here that this judgment orders the Commissioners' Court of Midland County to divide said county into four Commissioners' Precincts "for the convenience of the people of said County" and in so doing to establish such commissioners' precincts "so that each will have substantially the same number of people". The order thus exceeds the admonition contained in the Texas Constitution that requires only that the division of the county in such precincts be "for the convenience of the people", which, as stated in Lewis v. Harris, supra, cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths and taxable valuations, however desirable, in certain instances, such a division might be. Just as

there is no law or constitutional requirement that such a division be made, neither is there authority, in our opinion, for the lower court herein to compel the establishment of commissioners' precincts so that each will have substantially the same number of people. Following this reasoning, the lower court was without authority to enter the order embodied in its judgment, and such judgment must therefore be reversed.

Since this case has been thoroughly tried and expertly briefed by both parties, we feel that no useful purpose would be served by a remand, and this cause is therefore here rendered for the appellants.

Reversed and rendered.

William E. Clayton, Associate Justice.

[fol. 356] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 357]

IN THE SUPREME COURT OF TEXAS

From Midland County, Eighth District.

No. A-11272

HANK AVERY, Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al., Respondents.

OPINION—July 13, 1966

Article V, Section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one county commissioner . . ." This case presents for decision the question of the constitutional validity of such division in Midland County, Texas. The county was last redistricted by order of its commissioners court dated August 31, 1963, effective January 1, 1964. This suit by Petitioner, a resident property owner, taxpayer and qualified voter of Precinct No. 1, Midland County, attacks the division and seeks a redistricting. The judgment of the trial court set aside the current and previous orders dividing Midland County into commissioners precincts and ordered a redistricting of the county on the basis of equality of population in the precincts. The Court of Civil Appeals reversed the judgment of the trial court and rendered a take-nothing judgment against Petitioner. 397 S.W.2d 919. We reverse the judgments below and remand the case to the trial court for further proceedings.

The findings of the trial court in its judgment, and the decretal portions thereof, will be helpful to an understanding of our holding and disposition of the cause. We quote from the findings of the trial court:

[fol. 358] "... Further, that on the date [August 31, 1963] of such Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining population of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters ... resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County....

"The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants ... did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting any division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the prin-

cipal purposes of Defendants . . . in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect the majority of the members of the Commissioners' Court of said County.

[fol. 359] "The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County . . . was not for the convenience of the people of Midland County . . . ."

The decretal portions of the judgment, however, were as follows:

"IT IS, THEREFORE, ADJUDGED AND DECREED by the Court that the order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that not later than the next succeeding July or August term of the Commissioners' Court of Midland County, Texas, that said Commissioners' Court . . . divide said County into four Commissioners' Precincts for the convenience of the people of said County *and in so doing* to establish such Commissioners' Precincts *so that each will have substantially the same number of people.*" (Italics added)

Petitioner attacks the current and prior orders of the commissioners court dividing Midland County into commisioners precincts as invalid under Article V, Section 18,

Article I, Section 3, and Article I, Section 19, of the Texas Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution, because of the gross population disparity. He argues that these constitutional provisions require equality of population in the precincts. Respondents assert, on the other hand, that Petitioner did not state or show a cause of action, [fol. 360] or establish a justiciable interest or right to bring this suit as representative of a class, because equality of population in the precincts is not required but only that the precinct division be for the convenience of the people in the terms of Article V, Section 18, of the Texas Constitution.

Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights. Cf. *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962); *Stovall* v. *Shivers*, 129 Tex. 256, 103 S.W.2d 363 (1937); *Dubose* v. *Woods*, 162 S.W. 3 (Tex.Civ. App. 1913, no writ hist.). We agree with the holding of the trial court that the current order of the commissioners court redistricting Midland County is not supportable under the requirements of the Texas and the United States Constitutions for the reasons stated by the trial court in its judgment findings. We are not in agreement, however, with the judgment of the trial court to the extent that it orders a redistricting of the county on the sole basis of equality of population.

Article V, Section 18, of the Texas Constitution provides:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts . . . Divisions shall be made by the Commissioners Court provided for by this Constitution. . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the [fol. 361] qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County

> Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article I, Section 3, reads as follows:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The county is a subordinate and derivative branch of state government. Its governmental body is the commissioners court composed of the four county commissioners with the county judge as the presiding officer. See Articles 2351 et seq., Vernon's Ann. Civ. Stats., for an enumeration of the statutory powers and duties of the commissioners court. The appellation "court" is a misnomer in the accepted meaning of the designation. See 11 Tex.L.Rev. 518 (1933). The commissioners are elected by the qualified voters of the precincts; the county judge is elected by the qualified voters of the entire county. The primary function of the commissioners court is the administration of the business affairs of the county. See *Ehlinger* v. *Clark*, 117 Tex. 547, 8 S.W.2d 666 (1928). Its legislative functions are negligible and county government is not other- [fol. 362] wise comparable to the legislature of a state or to the federal Congress where the "one man, one vote" principle is asserted in its most exacting and compelling sense. See *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed.2d 506 (1964);[1] *Westberry* v. *Sanders*, 376 U.S. 1,

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[1] "Political subdivisions of States—counties, cities, or whatever —never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 52 L.ed.

84 S.Ct. 526, 11 L.ed.2d 481 (1964); *Gray* v. *Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.ed.2d 821 (1963); *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962).

This Court has not written upon the specific duty of the commissioners court under Article V, Section 18, to divide the county from time to time into four commissioners precincts for the convenience of the people. There are four cases in which the Courts of Civil Appeals have done so: *Lewis* v. *Harris*, 48 S.W.2d 730 (Tex.Civ.App. 1932, writ ref.); *Ward* v. *Bond*, 10 S.W.2d 590 (Tex.Civ.App. 1928, no writ hist.); *Williams* v. *Woods*, 162 S.W. 1031 (Tex. Civ.App. 1914, no writ hist.); *Dubose* v. *Woods*, 162 S.W. 3 (Tex.Civ.App. 1913, no writ hist.). In *Harris*, 20 per cent of the people of the county elected three of the four commissioners and the taxable values in the one precinct containing 80 per cent of the population substantially exceeded [fol. 363] those of the three other precincts combined. The suit was for a mandamus to compel a redistricting. It was held that such facts did not show that the discretion of the commissioners court had been abused by arbitrary action, the court saying:

> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners'

151, 159, 28 S.Ct. 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." Reynolds v. Sims, supra, 377 U.S. at 575.

> court in proportion to their respective populations, voting strengths, and taxable valuations. . . ."

Ward v. *Bond* considered a division order redistricting the county into new commissioners precincts equal in area but unequal in population to the extent that 54.5 per cent of the voters elected one commissioner, with 45.5 per cent electing the other three commissioners. The Court of Civil Appeals affirmed the action of the trial court sustaining the division order. The Court stated that disparity in population was not a sufficiently serious consideration to justify a reversal of the trial court judgment but pointed out that the disparity in population would shortly disappear as the result of the construction of a railroad through the county. The Court also sought to distinguish the *Dubose* and *Williams* cases on the ground that the new division lines in these cases practically deprived some voters of their right of franchise.

[fol. 364] The *Williams* and *Dubose* cases were sequels and county districting orders were held invalid in each case. In *Williams*, Dunn County was divided in such manner that 500 voters would elect two commissioners and 120 voters would elect two commissioners. There was a similar disparity in area. It was recognized by both parties that the precincts had been divided along ethnic lines, the Court saying:

> "The great disparity in acreage and population is sought to be justified only on the ground that the county should be so divided as to give the Anglo-Saxons a part of the precincts and the Mexican population the others. Convenience of the voter did not enter the consideration of the Court, but divisions of the territory were made that would tend to foment strife among citizens of different races."

Dubose, involved a division of Dunn County under which 500 voters elected one commissioner and 140 voters elected the remaining three commissioners, together with similar

disparity in area and public roads. Moreover, the precincts were drawn so as to deprive two towns in the county of polling places where they had been located for the past thirty years. The Court said: "The facts alleged in the sworn petition show conclusively that as to neither class of precincts is the division of the county one which is convenient to the people of said county; and in fact such division is so arbitrary and wrong that the court should not for a moment tolerate the same. . . . When considered as commissioners precincts, it is manifest that wrong was committed in making the districts largely disproportionate [fol. 365] as to acreage and population. . . . The government of the county will be taken away from the majority of the voters. . . ."

The requirements of Article V, Section 18, of the Texas Constitution are to be construed and enforced consistently with Article I, Section 3, commonly referred to as the equal rights or equal protection clause of the Texas Constitution. Cf. *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942). Equal protection of laws is not secured if persons are deprived of equality in political rights or otherwise subjected to an arbitrary exercise of governmental powers. See *Burroughs* v. *Lyles*, 142 Tex. 704, 181 S.W.2d 570 (1944); *Mumme* v. *Marrs*, 120 Tex. 383, 40 S.W.2d 31 (1931); *Glasgow* v. *Terrell*, 100 Tex. 581, 102 S.W. 98 (1907). This Court considered the terms "convenient" and "convenience of the people" appearing in Article V, Section 18, in *Williams* v. *Castleman*, 112 Tex. 193, 247 S.W. 263 (1922), involving an order of the commissioners court creating an additional justice of the peace precinct. Two principles relevant here were there recognized, namely, that in discharging the requirements of Article V, Section 18, the commissioners court was given some discretion to meet the "changing needs of the people" but such must be "exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion." [fol. 366] The basic problem of Texas counties in the respects under review is the extent of political power which

the metropolitan areas should have in relation to the rural areas. The very fact of population concentration enables the city voters to elect the county-wide officers. We recognized in *Pritchard & Abbott* v. *McKenna*, 162 Tex. 617, 350 S.W.2d 333 (1961), that the county commissioners court is not charged with the management and control of all of the county's business affairs; and that the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp. The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

[fol. 367] As we have said, equal rights and equal protection of laws require equality in political rights and there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of

qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which he ordered a redistricting to achieve substantial equality of population.

We agree with the holding of the trial court that there is obvious arbitrariness in the current districting order here under attack because of the patent malapportionment of the commissioners precincts of Midland County. The judgment findings of the trial court show the absence of any rational basis therefor.

We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States[2] Constitutions do not require a com- [fol. 368] missioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the existence and effect of other relevant factors such as those we have mentioned. But neither this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. In no event is a population disparity sustainable against a showing of discrimination, fraud, arbitrariness or abuse of discretion.

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[2] "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 1, United States Constitution. See *Tedesco* v. *Board of Supervisors*, 43 So.2d 514 (La.App.), appeal denied, 339 U.S. 940, 70 S.Ct. 797, 94 L.ed. 1357 (1960), and the clarification in *Baker* v. *Carr*, 369 U.S. at 233, of the dismissal of the appeal in *Tedesco* for want of a substantial federal question, to wit, there was a rational justification for the population disparity in the districting of city council seats.

The judgments of the Court of Civil Appeals and of the trial court are reversed and the cause is remanded to the trial court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

Zollie Steakley, Associate Justice.

Associate Justice Hamilton not sitting.
Associate Justice Smith dissenting.

Opinion delivered July 13, 1966.

[fol. 369] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 370]

IN THE SUPREME COURT OF TEXAS

From Midland County—Eighth District

No. A-11272

HANK AVERY, Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al., Respondents.

DISSENTING OPINION—July 13, 1966

I respectfully dissent. I would affirm the judgment of the Court of Civil Appeals. This is not a "one man-one vote" case, nor is there any constitutional requirement for equality in commissioners precincts. Article V, Section 18[1] of the Texas Constitution governs the organization of

[1] "Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court pro-

commissioners precincts. It is well settled by Texas cases that the phrase "for the convenience of the people" in said Article, confers on commissioners courts the discretion to divide precincts in some physically convenient way, and that there is no requirement for equality of population, and no duty to provide precincts which are equal in population. This is an "abuse of discretion case," the only question before this Court being whether a single private citizen, as here, has a vested right and cause of action to revise and review a commissioners court precinct order to achieve equality in population. The trial court in its judgment, [fol. 371] made several findings of fact, as the Court has indicated, but the decretal portion of the judgment only relates to the finding in regard to population disparity. The judgment directs the commissioners court to use equal distribution of population as the dominant factor in redistricting the County. The judgment rendered by this Court is meaningless. If the Court remands the cause generally for a new trial, citizen Avery has accomplished nothing. On the other hand, if the judgment of the trial court striking down the commissioners court order is upheld, still nothing has been accomplished, except to create additional chaos and confusion. This is true, because Avery, as a single individual and private citizen, has no right or standing in court to question the way the government is

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vided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954."

run or organized, including the location of commissioners precinct boundaries in Midland County, Texas, unless and until he can show some personal loss, damage or harm to his private interests resulting from the governmental operation. See Meredith v. Sharp, Tex. Civ. App., 256 S.W.2d 870 (1953, writ refused, no reversible error) with Per Curiam opinion, 152 Tex. 437, 259 S.W.2d 172. This case was one wherein mandamus was sought to require a commissioners court to create the office of Justice of the Peace, Place No. 2 of Justice of the Peace, Precinct One of Gregg County, Texas. I think the Court would have made the same holding had the cause been before the appellate courts on appeal.

The Court upheld the judgment of the trial court that Article V, Section 18 of the Texas Constitution "confides in the Commissioners' Court the authority to create a justice of the peace court as here sought; that the convenience of the people is the basic purpose for designating such an additional justice court; *and that the creation of such additional justice of the peace court is a discretionary act of the Commissioners' Court and not a ministerial function of such court.*" [Emphasis added.] The Court then said:

> [fol. 372] "We cannot escape the import of the use of the term 'for the convenience of the people' in Sec. 18, supra; 16 C.J.S., Constitutional Law, §23. The latitude so granted the Commissioners' Court to create not less than four and not more than eight such precincts, and the power to change the boundaries of such precincts from time to time emphasizes the intent to vest discretionary powers in the Commissioners' Court in determining whether or not the creation of such additional court would be for the convenience of the people, that is suitable, appropriate or advisable to meet the needs of the people. This discretionary power on the part of the Commissioners' Court is fully recognized in Williams v. Castleman, 112 Tex.

193, 247 S.W. 263, by our Supreme Court, which involved an affirmative act of the Commissioners' Court in creating such an additional Justice Court, and in the holdings in Lewis v. Harris, Tex. Civ. App., 48 S.W.2d 730, and Ward v. Bond, Tex. Civ. App., 10 S.W.2d 590, 594, which dealt with the discretionary powers of a Commissioners' Court as related to the latter clause of Sec. 18, supra, in altering a Commissioners' Precinct.

"'Mandamus will not lie to control or review the action of an official or board upon matters involving the exercise of discretion or judgment confided to such official or board.' Lewis v. Harris, supra, 48 S.W.2d at page 732; 28 T. J. (Mandamus), Sec. 33."

This holding in regard to discretionary power to create justice courts is equally applicable to this case where the commissioners court has exercised its discretion in changing its boundary lines.

If it can be said that the judgment of the trial court is based upon a finding of abuse of discretion and that Avery has a justiciable interest, I nevertheless maintain that the trial court confined its holding to require a redistricting of Midland County into commissioners precincts upon the basis of population alone.

Avery is in no position to individually attack or set aside the order creating Midland County commissioners precincts because of a disparity in the population of the several precincts in the absence of a showing of some damage, harm, inconvenience, or financial loss to himself personally. This he has failed to do. There being no duty to provide Avery with equally populated commissioners precincts, no legal wrong has been done to him by refusal to divide in that way; there has been no invasion of his [fol. 373] personal rights by including him in a commissioners precinct with a population larger than the other precincts.

Avery attempts to also bring this suit in terms of a class action. In this attempt he completely fails. In his petition he states his capacity as follows:

> "Plaintiff files this petition on behalf of himself and other persons similarly situated in the City of Midland, Precinct No. 1, Midland County, Texas, and states that he is a resident, taxpayer, and legally qualified voter and elector of the City of Midland, Precinct No. 1, Midland County, Texas, and that, as such, he is legally qualified to vote for municipal, precinct and county offices in Midland County, Texas."

The right which he sought was as follows:

> "The Plaintiff has a right and interest to see that *his* civil rights and liberties and in particular *his* right and interest in an equitable apportionment of voting power for members of the Commissioners Court are protected in accordance with the terms of the Texas Constitution and Section 1 of the 14th Amendment to the Constitution of the United States."

The pleadings in this case upon which Avery went to trial are completely void of allegations which would qualify as a class action. The petition fails to comply with any of the provisions of Rule 42,[1] Texas Rules of Civil Pro-

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[1] "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, in behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

cedure. Only a quick glance at the rule is required to con- [fol. 374] clude that Avery does not seek to qualify under subdivision (1) of the rule, because the rights which he seeks to enforce are *his* rights and liberties and *his* right to equitable voting power. Such right is not joint or secondary and on its face could not be the proper subject of a class action under subdivision (1) of the rule. Subdivision 2 is out, because there is no specific property involved in this action. Avery's petition fails to qualify him as representing a class, in that it fails to state that there are persons constituting a class. The petition on which he went to trial does not allege that there are other persons having a common interest with Avery in an adjudication of a common question of fact or law. In fact, the record shows that public officials and many others who publicly refused to support Avery, were all citizens of Midland. The evidence and the proceedings fail to show any support of Avery's position from the City of Midland or the residents of the City as a group. The petition does not describe any identifiable class of persons nor state or show that they are so numerous as to make their joinder in the suit impracticable. There is nothing in the petition to show that there are others "similarly situated." The pleadings are lacking and Avery produced no evidence to warrant a valid class judgment. See Schenker v. City of San Antonio, Tex. Civ. App., 369 S.W.2d 626 (wr. ref., n.r.e. 1963).

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it. Amended by order of September 20, 1941, effective December 31, 1941."

Since the subject matter of Avery's complaints in this Court is the disparity of population, and since that subject is a matter of *public* not *private* concern, and since Avery did not properly allege or prove a class action in the trial court, so as to represent the public, the result is that he never reaches or gets to the question of substantial evidence, abuse of discretion, or his asserted claims to *alternative*[5] relief.

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[5] The prayer, reflecting the relief sought, reads as follows:

"Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

"(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said county into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

"(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people, giving proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

"(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully

[fol. 375] Avery has no standing in this Court to complain of the action of the Court of Civil Appeals on his

and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election thereunder and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters."

substantial evidence and alternative relief claims. I would dismiss this cause for want of jurisdiction. In no event does the Constitution of the United States or the Texas [fol. 376] Constitution require that Midland County be divided into four equally populated precincts. The Court's view, if finally adopted, will lead to great confusion and uncertainty not only in Midland County, but in every county in Texas with citizens who have a desire to substitute their judgment for that of the commissioners courts. It seems to me that this is not the proper case in which to extend the doctrine of the one man-one vote rule to the governing bodies of local governments such as commissioners courts. Perhaps, in a proper case, the federal courts will in the future take jurisdiction under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, but I cannot imagine a situation, much less the one presented in this case, where the Texas Constitution or the case law would warrant a holding that there must be equality of population in Commissioners precincts.

Clyde E. Smith, Associate Justice.

Opinion delivered: July 13, 1966.

[fol. 377] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 378]

IN THE SUPREME COURT OF TEXAS

From Midland County—Eighth District

No. A-11,272

HANK AVERY,

vs.

MIDLAND COUNTY, TEXAS, et al.

JUDGMENT—July 13, 1966

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Smith dissenting) (Associate Justice Hamilton not sitting) that there was error in the judgments of the Courts below, it is, therefore, *adjudged, ordered* and *decreed* that the judgments of the District Court and Court of Civil Appeals be, and hereby are, reversed and set aside, and that this cause be, and hereby is, remanded to the District Court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

It is further ordered that petitioner, Hank Avery, pay one-half (½) of the costs expended and incurred in this Court and Court of Civil Appeals; that respondents, Midland County, Texas, Alvey A. Bryant, Clark Moreland and Louis Osborne, pay one-half (½) of the costs expended and incurred in this Court and Court of Civil Appeals, and that this decision, with a copy of the opinion, be certified to the District Court of Midland County, Texas, for observance.

[fol. 379] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 380]

IN THE SUPREME COURT OF TEXAS

No. A-11,272

HANK AVERY, Petitioner,

vs.

MIDLAND COUNTY, TEXAS, et al., Respondents.

PETITIONER'S MOTION FOR REHEARING—Filed July 28, 1966

To the Honorable Supreme Court:

Now comes Hank Avery, Petitioner in the above numbered and entitled cause, and respectfully moves the Court to set aside the judgment of this Court rendered on July 13, 1966, and to grant a rehearing and in all things affirm the judgment of the trial court, showing as assignments of error the following:

First Point: The Supreme Court erred in holding that Amendment XIV, Section 1 of the Constitution of the United States does not require that the four County Commissioners' Precincts of Midland County, Texas, have [fol. 381] substantially the same number of people.

Second Point: The Supreme Court erred in holding that Article I, Section 3, Article I, Section 19, and Article V, Section 18 of the Constitution of Texas, when construed together, do not require that the four County Commissioners' Precincts of Midland County, Texas, have substantially the same number of people.

Third Point: The Supreme Court erred in holding that the trial court was without authority to enter the order embodied in its judgment which required the Commis-

[File endorsement omitted]

sioners' Court of Midland County to divide said County into four County Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people.

Fourth Point: The Supreme Court erred in reversing the judgment of the trial court for the reason that such judgment, when considered as a whole, is in accordance with the opinion of this Court.

Petitioner respectfully prays that this motion be granted and that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be affirmed. [fol. 382] With leave of the Court, Petitioner will shortly file a brief in support of this Motion For Rehearing.

William A. Olson, 900 Brazos Street, Houston, Texas 77002, Attorney for Petitioner.

Proof of Service (omitted in printing).

[fol. 383] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 384]

IN THE SUPREME COURT OF TEXAS

From Midland County—Eighth District

No. A-11,272

HANK AVERY,

vs.

MIDLAND COUNTY, TEXAS, et al.

ORDER DENYING PETITIONER'S MOTION FOR REHEARING—
October 12, 1966

Petitioner's motion for rehearing, filed in the above numbered and entitled cause on July 28, 1966, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 385]

SUPREME COURT OF THE UNITED STATES

No. 958, October Term, 1966

HANK AVERY, Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al.

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

JAN 10 1967
JOHN F. DAVIS, CLERK

NO. ~~9558~~ 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HANK AVERY, *Petitioner*

v.

MIDLAND COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Question Presented	3
Statement of the Case	3
Argument Amplifying Reasons for Granting Writ	5
Conclusion	7
Appendix A (Opinion of Supreme Court of Texas)	9
Appendix B (Dissenting Opinion)	21
Appendix C (Opinion of the Court of Civil Appeals)	29
Appendix D (28 U.S.C. Sec. 1257(3))	36
Appendix E (Constitution of State of Texas)	37
Appendix F (Acts of the Texas Legislature Relating to Commissioners Court)	39
Appendix G (United States Constitution, Amendment XIV, § 1)	53
Appendix H (Judgment of Supreme Court of Texas)	54

LIST OF AUTHORITIES

CASES	Page
Avery v. Midland County, 397 S.W.2d 919 (Tex. Civ.App.)	2
Avery v. Midland County, 406 S.W.2d 422 (Tex. Sup.Ct.)	2
Baker v. Carr, 369 U.S. 186	5
Earle C. Moody, et al., Appellants v. Richmond M. Flowers, et al., Appellees, No. 624, October Term, 1966, Docket of the Supreme Court of the United States	5
CONSTITUTION OF THE UNITED STATES	
14 Amendment, Sec. 1	2, 7
UNITED STATES STATUTES	
28 U.S.C. 1257(3)	2, 3
CONSTITUTION OF STATE OF TEXAS	
Article I, Secs. 3 and 19	2, 3
Article V, Sec. 18	2, 3
REVISED CIVIL STATUTES OF TEXAS	
Article 2339	3
Article 2340	3
Article 2342	3
Article 2351	3, 6
Article 2352	3, 6
Article 2352d	3
Article 2354	3
Article 2356	3
Article 2357	3
Article 2370b	3

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HANK AVERY, *Petitioner*

v.

MIDLAND COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas, which judgment reversed the judgments of the District Court and the Court of Civil Appeals and ordered the trial court to enter a judgment in accordance with the opinion of the Supreme Court. The judgment of the District Court, which was set aside by the Supreme Court, had granted to Petitioner the relief he sought by directing that the "one-man, one-vote" principle be applied.

OPINIONS BELOW

The opinions of the courts below are not reported officially. The majority opinion of the Supreme Court of Texas is unofficially reported at 406 S.W.2d 422. Same appears herein as Appendix A at p. 9. The dissent is reported at 406 S.W.2d 429 and appears herein as Appendix B at p. 21. Neither opinion gave to Petitioner the relief sought. The unofficial report of the opinion of the Court of Civil Appeals appears at 397 S.W.2d 919. It is Appendix C herein and appears at p. 29.

JURISDICTION

This suit was instituted in a State District Court seeking to have the apportionment of Midland County, Texas, into precincts heretofore made by the Commissioners Court of such County set aside and said Commissioners Court directed to reapportion said County so that the population of each precinct would be substantially equal. This right was claimed under Article V, Section 18, Article I, Sections 3 and 19 of the Constitution of the State of Texas and under Sec. 1 of the 14th Amendment of the Constitution of the United States.

The Judgment of the Supreme Court of Texas was entered on July 12, 1966, and within 15 days, the time provided by the Texas Rules of Civil Procedure. A motion for rehearing was filed by Petitioner. Such motion for rehearing was overruled on October 13, 1966, without any written opinion.

Jurisdiction to review this judgment is conferred on this court by 28 U.S.C. Sec. 1257 (3) since Petitioner is specially claiming a right under the Constitution and laws of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. Sec. 1257 (3) which is set forth in Appendix D, infra, at P. 36. Article V, Sec. 18 and Article I, Sections 3 and 19 of the Constitution of Texas, which are set forth in Appendix E, infra, at P. 37. The following enactments of the Texas Legislature: Articles 2339, 2340, 2342, 2351, 2352, 2352d, 2354, 2356, 2357, 2370b, Vernon's Civil Statutes of the State of Texas, which are set forth in Appendix F, infra, at P. 39. The United States Constitution, Amendment XIV, Section I, which is set forth in Appendix G, infra, at P. 53.

QUESTION PRESENTED

Whether the Fourteenth Amendment's equal protection clause permits the continuation of the practice of the Commissioners' Court of Midland County to divide said county into precincts in a manner whereby approximately 95% of the county's population is accorded only 25 per cent representation (1 member) on the 4-member governing board.[1]

STATEMENT OF THE CASE

Petitioner, as a citizen, taxpayer, and voter of the United States, and the State of Texas, and Midland County, Texas, brought this action individually and on behalf of others similarly situated, against Respondents to set aside an order of the Commissioners Court, which was entered on August

1. The Commissioners' Court is composed of the four Commissioners and the County Judge, who presides over same. The County Judge is elected countywide. Art. V, Sec. 18, Tex. Const. Thus while the presiding officer of the court is elected countywide, effective control is maintained by the three man majority.

31, 1963, to be effective as of January 1, 1964, dividing the County into four new Commissioners' Precincts (Tr. 345). Petitioner further sought to have said Respondents directed to reapportion said County into precincts having substantially an equal number of people. The Trial Court granted this relief but the Appellate Courts, including the Supreme Court of Texas, denied Petitioner's relief seeking to require the Commissioners Court to redistrict the County into four precincts of substantially equal population.

The Federal Question involved herein was raised in the Trial Court by the Petition upon which Petitioner went to trial. TR. p. 321. It was raised in the Supreme Court by assignment of error as shown by the opinion of that Court. See Appendix A, infra, p. 9. A copy of the Judgment of the Supreme Court of Texas is attached as Exhibit H.

The facts involved in the Appeal are simple and uncontroverted. On August 31, 1963, Respondents Gideon, Bryant, Moreland, and Osborne, constituting and acting as members of the Commissioners' Court of Midland County adopted an order dividing the County into four new Commissioners' Precincts (TR. 345). At such time, Midland County had a population of approximately 70,000 persons and in excess of 95% of such population resided in the new Commissioners Precinct No. 1 (TR. 345-6). At such time, 97% of the qualified voters of said County as shown by the lists prepared by the County Tax Assessor-Collector resided in the new Commissioners Precinct No. 1 (TR. 346). The Trial Court further found that the action of the Commissioners Court in setting such boundaries for precincts constituted invidious discrimination (TR. 347). The Trial Court further found that the County could have been divided into Commissioners' Pre-

cincts on a basis or plan taking into proper account population and other pertinent factors, which would have been and which would be practical for the convenience of the people. (TR. 346).

The above figures establish the following:

(1) The City of Midland represents 95% of the total population of Midland County, but is accorded only 25% representation (1) member on the four-member County governing board.[2]

(2) Five percent of the County's rural qualified voters can elect a majority of members to the board and thereby exercise perpetual veto power over the will of the majority of the County's urban voters.

(3) A rural voter who lives in Precinct No. 3 (there were 98 votes cast for Commissioner Precinct No. 3 in the 1964 Democratic Primary (S.F. 253) has 74½ times the voting power of a voter in Precinct No. 1 (where 7300 votes were cast in the Democratic Primary of 1964.).

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT

There is presently pending before this court a case involving the same issues as the instant case. That case is No. 624, October Term, 1966, *Earle C. Moody, Et Al. Appellants v. Richmond M. Flowers, Et Al. Appellees.* The authorities cited in the *Moody Case, Supra,* fully discuss the issues involved and strongly supports the application of the "one man-one vote" principle enunciated in *Baker v. Carr,* 369 U.S. 186 to political sub-divisions of the States. Indeed no reason exists to hold that the duly elected representatives to one governing body must be chosen by application of

2. See Footnote 1, supra.

the "one man-one vote" principle and representatives to another governing body need not be chosen by such process.

Certainly it is no answer to state that one governing body is more important than the other. All governing bodies are important to those who are subject to their actions. The Commissioners Court of Midland County has the power to levy taxes (Art. 2352 V.A.C.S., Appendix F, Infra, P. 48) for various purposes. It also has the power, among others, to exercise general control over Roads, highways, and bridges (Art. 2351, Sec. 6, V.A.C.S., Appendix F, Infra, P. 40), provide and keep in repair all Public Buildings (Art. 2351, Sec. 7, V.A.C.S., Appendix F, Infra, P. 40), provide for distribution of commodities to persons in need of assistance (Art. 2351, Sec. 17A & B, V.A.C.S., Appendix F, Infra, P. 42); provide for an airport (Art. 2351, Sec. 18A-E V.A.C.S. Appendix F, Infra, P. 44.

The issues which the Commissioners' Court is required to handle are important ones affecting the everyday life of the citizens of the County. Thus each citizen should have an equal voice in determining such issues. Indeed, the power to tax, standing alone, should be sufficient to require that each citizen's vote be the equal of any other citizen's vote.

The Opinion of the Supreme Court of Texas states that the basic problem involved herein is the extent of political power that the metropolitan area should have in relation to the rural area. The Court goes on to state the scope of the Commissioners' Court is limited so that its major responsibilities are to the non-urban areas of the County. The Court then cites such factors as qualified voters, land areas, geography, miles of county roads and taxable values as justifying the debasement of the Urban voter's vote.

The 14th Amendment does not grant equal protection of the law to roads, geography or land areas nor to any object than persons. If the fear is that the Urban majority will take advantage of the Rural minority then it should be remembered that the 14th Amendment also protects the rural minority. It should also be remembered that the amount of tax paid by a person does not affect the value of his vote.

Petitioner has no political remedy. In fact, he has no remedy other than this cause. The Commissioners Court of Midland County has the power to reapportion itself but it has consistently refused to do so in such manner as to grant substantial equality to Petitioner and other members of his class. No other political body has the power to reapportion it. The majority of the Commissioners Court have made it perfectly clear that they have no intention of reapportioning the County in such manner as to give Petitioner's class substantial equality with the rural voter.

CONCLUSION

The jurisdiction and power to enforce the rights granted to Petitioner under the 14th Amendment rests in this court. Petitioner has no other remedy. The clear provisions of the 14th Amendment and the cases decided under it by this Court entitle Petitioner to the relief sought.

Wherefore, Premises considered, Petitioner prays that this Petition be granted and that the judgment of the Supreme Court of Texas be reviewed by this Court; that on such review the decision of the Supreme Court of Texas be reversed and this cause be remanded with instructions that the Commissioners Court of Midland County,

Texas, be reapportioned in such manner that each precinct has substantially the same number of people as each other.

Respectfully submitted,

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APPENDIX "A"

Opinion of Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11272.

HANK AVERY,
Petitioner,

From Midland County,

v.

Eighth District.

MIDLAND COUNTY, TEXAS, ET AL.,
Respondents.

Article V, Section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one county commissioner . . ." This case presents for decision the question of the constitutional validity of such division in Midland County, Texas. The county was last redistricted by order of its commissioners court dated August 31, 1963, effective January 1, 1964. This suit by Petitioner, a resident property owner, taxpayer and qualified voter of Precinct No. 1, Midland County, attacks the division and seeks a redistricting. The judgment of the trial court set aside the current and previous orders dividing Midland County into commissioners precincts and ordered a redistricting of the county on the basis of equality of population in the precincts. The Court of Civil Appeals reversed the judgment of the trial court and rendered a take-nothing judgment against Petitioner. 397 S.W.2d 919.

We reverse the judgments below and remand the case to the trial court for further proceedings.

The findings of the trial court in its judgment, and the decretal portions thereof, will be helpful to an understanding of our holding and disposition of the cause. We quote from the findings of the trial court:

> ". . . Further, that on the date [August 31, 1963] of such Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining population of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters . . . resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County. . . .
>
> "The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting any division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the principal purposes of Defendants . . . in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect the majority of the members of the Commissioners' Court of said County.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County . . . was not for the convenience of the people of Midland County . . . ."

The decretal portions of the judgment, however, were as follows:

"IT IS, THEREFORE, ADJUDGED AND DECREED by the Court that the order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that not later than the next succeeding July or August term of the Commissioners' Court of Midland County, Texas, that said Commissioners' Court . . . divide said County into four Commissioners' Precincts for the convenience of the people of said County *and in so doing* to establish such Commissioners' Precincts *so that each will have substantially the same number of people.*" (Italics added)

Petitioner attacks the current and prior orders of the commissioners court dividing Midland County into commissioners precincts as invalid under Article V, Section 18, Article I, Section 3, and Article I, Section 19, of the Texas Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution, because of the gross population disparity. He argues that these constitutional provisions require equality of population in the precincts. Respondents assert, on the other hand, that Petitioner did not state or show a cause of action, or establish a justiciable interest or right to bring this suit as representative of a class, because equality of population in the precincts is not required but only that the precinct division be for the convenience of the people in the terms of Article V, Section 18, of the Texas Constitution.

Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights. Cf. *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962); *Stovall v. Shivers,* 129 Tex. 256, 103 S.W.2d 363 (1937); *Dubose v. Woods,* 162 S.W. 3 (Tex. Civ.App. 1913, no writ hist.). We agree with the holding of the trial court that the current order of the commissioners court redistricting Midland County is not supportable under the requirements of the Texas and the United

States Constitutions for the reasons stated by the trial court in its judgment findings. We are not in agreement, however, with the judgment of the trial court to the extent that it orders a redistricting of the county on the sole basis of equality of population.

Article V, Section 18, of the Texas Constitution provides:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts . . . Divisions shall be made by the Commissioners Court provided for by this Constitution. . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article I, Section 3, reads as follows:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The county is a subordinate and derivative branch of state government. Its governmental body is the commissioners court composed of the four county commissioners with the county judge as the presiding officer. See Articles

2351 et seq., Vernon's Ann. Civ. Stats., for an enumeration of the statutory powers and duties of the commissioners court. The appellation "court" is a misnomer in the accepted meaning of the designation. See 11 Tex.L.Rev. 518 (1933). The commissioners are elected by the qualified voters of the precincts; the county judge is elected by the qualified voters of the entire county. The primary function of the commissioners court is the administration of the business affairs of the county. See *Ehlinger v. Clark,* 117 Tex. 547, 8 S.W.2d 666 (1928). Its legislative functions are negligible and county government is not otherwise comparable to the legislature of the state or to the Federal Congress, where the "one man one vote" principle is asserted in its most exacting and compelling sense. See *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed.2d 506 (1964)[1]; *Westberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.ed.2d 481 (1964); *Gray v. Sanders,* 372 U.S. 868, 83 S.Ct. 801, 9 L.ed.2d 821 (1963). *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962).

This Court has not written upon the specific duty of the commissioners court under Article V, Section 18, to divide the county from time to time into four commissioners pre-

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1. "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 52 L.ed. 151, 159, 28 S.Ct. 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." Reynolds v. Sims, supra, 377 U.S. at 575.

cincts for the convenience of the people. There are four cases in which the Courts of Civil Appeals have done so: *Lewis v. Harris,* 48 S.W.2d 730 (Tex.Civ.App. 1932, writ ref.); *Ward v. Bond,* 10 S.W.2d 590 (Tex.Civ.App. 1928, no writ hist.); *Williams v. Woods,* 162 S.W. 1031 (Tex. Civ.App. 1914, no writ hist.); *Dubose v. Woods,* 162 S.W. 3 (Tex.Civ.App. 1913, no writ hist.). In *Harris,* 20 per cent of the people of the county elected three of the four commissioners and the taxable values in the one precinct containing 80 per cent of the population substantially exceeded those of the three other precincts combined. The suit was for a mandamus to compel a redistricting. It was held that such facts did not show that the discretion of the commissioners court had been abused by arbitrary action, the court saying:

> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations . . ."

Ward v. Bond considered a division order redistricting the county into new commissioners precincts equal in area but unequal in population to the extent that 54.5 per cent of the voters elected one commissioner, with 45.5 per cent electing the other three commissioners. The Court of Civil Appeals affirmed the action of the trial court sustaining the division order. The Court stated that disparity in population was not a sufficiently serious consideration to justify

a reversal of the trial court judgment but pointed out that the disparity in population would shortly disappear as the result of the construction of a railroad through the county. The Court also sought to distinguish the *Dubose* and *Williams* cases on the ground that the new division lines in these cases practically deprived some voters of their right of franchise.

The *Williams* and *Dubose* cases were sequels and county districting orders were held invalid in each case. In *Williams*, Dunn County was divided in such manner that 500 voters would elect two commissioners and 120 voters would elect two commissioners. There was a similar disparity in area. It was recognized by both parties that the precincts had been divided along ethnic lines, the Court saying:

> "The great disparity in acreage and population is sought to be justified only on the ground that the county should be so divided as to give the Anglo-Saxons a part of the precincts and the Mexican population the others. Convenience of the voter did not enter the consideration of the Court, but divisions of the territory were made that would tend to foment strife among citizens of different races."

Dubose involved a division of Dunn County under which 500 voters elected one commissioner and 140 voters elected the remaining three commissioners, together with similar disparity in area and public roads. Moreover, the precincts were drawn so as to deprive two towns in the county of polling places where they had been located for the past thirty years. The Court said: "The facts alleged in the sworn petition show conclusively that as to neither class of precincts is the division of the county one which is convenient to the people of said county; and in fact such

division is so arbitrary and wrong that the court should not for a moment tolerate the same . . . When considered as commissioners precincts, it is manifest that wrong was committed in making the districts largely disproportionate as to acreage and population . . . The government of the county will be taken away from the majority of the voters. . . ."

The requirements of Article V, Section 18, of the Texas Constitution are to be construed and enforced consistently with Article I, Section 3, commonly referred to as the equal rights or equal protection clause of the Texas Constitution. Cf. *Railroad Commission v. Shell Oil Co.,* 139 Tex. 66, 161 S.W.2d 1022 (1942). Equal protection of laws is not secured if persons are deprived of equality in political rights or otherwise subjected to an arbitrary exercise of governmental powers. See *Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570 (1944); *Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31 (1931); *Glasgow v. Terrell,* 100 Tex. 581, 102 S.W. 98 (1907). This Court considered the terms "convenient" and "convenience of the people" appearing in Article V, Section 18, in *Williams v. Castleman,* 112 Tex. 193, 247 S.W. 263 (1922), involving an order of the commissioners court creating an additional justice of the peace precinct. Two principles relevant here were there recognized, namely, that in discharging the requirements of Article V, Section 18, the commissioners court was given some discretion to meet the "changing needs of the people" but such must be "exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion."

The basic problem of Texas counties in the respects under review is the extent of political power which the

metropolitan areas should have in relation to the rural areas. The very fact of population concentration enables the city voters to elect the county-wide officers. We recognized in *Pritchard & Abbott v. McKenna,* 162 Tex. 617, 350 S.W. 2d 333 (1961), that the county commissioners court is not charged with the management and control of all of the county's business affairs; and that the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp. The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

As we have said, equal rights and equal protection of laws require equality in political rights and there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On

the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which he ordered a redistricting to achieve substantial equality of population.

We agree with the holding of the trial court that there is obvious arbitrariness in the current districting order here under attack because of the patent malapportionment of the commissioners precincts of Midland County. The judgment findings of the trial court show the absence of any rational basis therefor.

We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States[2] Constitutions do not require a commissioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the

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2. "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV; § 1, United States Constitution. See **Tedesco v. Board of Supervisors,** 43 So.2d 514 (La.App.), appeal denied, 339 U.S. 940; 70 S.Ct. 797, 94 L.ed. 1357 (1960), and the clarification in **Baker v. Carr,** 369 U.S. at 235, of the dismissal of the appeal in **Tedesco** for want of a substantial Federal question, to wit, there was a rational justification for the population disparity in the districting of city council seats.

existence and effect of other relevant factors such as those we have mentioned. But neither this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. In no event is a population disparity sustainable against a showing of discrimination, fraud, arbitrariness or abuse of discretion.

The judgments of the Court of Civil Appeals and of the trial court are reversed and the cause is remanded to the trial court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

Zollie Steakley
Associate Justice

Associate Justice Hamilton not sitting.

Associate Justice Smith dissenting.

Opinion delivered
July 13, 1966.

APPENDIX "B"

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. I would affirm the judgment of the Court of Civil Appeals. This is not a "one man-one vote case," nor is there any constitutional requirements for equality in commissioners precincts. Article V, Section 18[1] of the Texas Constitution governs the organization of commissioners precincts. It is well settled by Texas cases that the phrase "for the convenience of the people" in said Article, confers on commissioners courts the discretion to divide precincts in some physically convenient way, and that there is no requirement for equality of population, and no duty to provide precincts which are equal in population. This is an "abuse of discretion" case," the only question before this Court being whether a single private citizen, as here, has a vested right and cause of action to revise and review a commissioners court precinct order

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1. "Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954."

to achieve equality in population. The trial court in its judgment, made several findings of fact, as the Court has indicated, but the decretal portion of the judgment only relates to the finding in regard to population disparity. The judgment directs the commissioners court to use equal distribution of population as the dominant factor in redistricting the County. The judgment rendered by this Court is meaningless. If the Court remands the cause generally for a new trial, citizen Avery has accomplished nothing. On the other hand, if the judgment of the trial court striking down the commissioners court order is upheld, still nothing has been accomplished, except to create additional chaos and confusion. This is true, because Avery, as a single individual and private citizen, has no right or standing in court to question the way the government is run or organized, including the location of commissioners precinct boundaries in Midland County, Texas, unless and until he can show some personal loss, damage or harm to his private interests resulting from the governmental operation. See Meredith v. Sharp, Tex.Civ.App., 256 S.W.2d 870 (1953, writ refused, no reversible error) with Per Curiam opinion, 152 Tex. 437, 259 S.W.2d 172. This case was one wherein mandamus was sought to require a commissioners court to create the office of Justice of the Peace, Place No. 2 of Justice of the Peace, Precinct One of Gregg County, Texas. I think the Court would have made the same holding had the cause been before the appellate courts on appeal.

The Court upheld the judgment of the trial court that Article V, Section 18 of the Texas Constitution "confides in the Commissioners' Court the authority to create a justice of the peace court as here sought; that the convenience of the people is the basic purpose for desig-

nating such an additional justice court; *and that the creation of such additional justice of the peace court is a discretionary act of the Commissioners' Court and not a ministerial function of such court.*" [Emphasis added.] The Court then said:

> "We cannot escape the import of the use of the term 'for the convenience of the people' in Sec. 18, supra; 16 C.J.S., Constitutional Law, § 23. The latitude so granted the Commissioners' Court to create not less than four and not more than eight such precincts, and the power to change the boundaries of such precincts from time to time emphasizes the intent to vest discretionary powers in the Commissioners' Court in determining whether or not the creation of such additional court would be for the convenience of the people, that is suitable, appropriate or advisable to meet the needs of the people. This discretionary power on the part of the Commissioners' Court is fully recognized in Williams v. Castleman, 112 Tex. 193, 247 S.W. 263, by our Supreme Court, which involved an affirmative act of the Commissioners' Court in creating such an additional Justice Court, and in the holdings in Lewis v. Harris, Tex.Civ.App., 48 S.W.2d 730, and Ward v. Bond, Tex.Civ.App., 10 S.W.2d 590, 594, which dealt with the discretionary powers of a Commissioners' Court as related to the latter clause of Sec. 18, supra, in altering a Commissioners' Precinct.
>
> "'Mandamus will not lie to control or review the action of an official or board upon matters involving the exercise of discretion or judgment confided to such official or board.' Lewis v. Harris, supra, 48 S.W.2d at page 732; 28 T. J. (Mandamus), Sec. 33."

This holding in regard to discretionary power to create justice courts is equally applicable to this case where the commissioners court has exercised its discretion in changing its boundary lines.

If it can be said that the judgment of the trial court is based upon a finding of abuse of discretion and that Avery has a justiciable interest, I nevertheless maintain that the trial court confined its holding to require a redistricting of Midland County into commissioners precincts upon the basis of population alone.

Avery is in no position to individually attack or set aside the order creating Midland County commissioners precincts because of a disparity in the population of the several precincts in the absence of a showing of some damage, harm, inconvenience, or financial loss to himself personally. This he has failed to do. There being no duty to provide Avery with equally populated commissioners precincts, no legal wrong has been done to him by refusal to divide in that way; there has been no invasion of his personal rights by including him in a commissioners precinct with a population larger than the other precincts.

Avery attempts to also bring this suit in terms of a class action. In this attempt he completely fails. In his petition he states his capacity as follows:

> "Plaintiff files this petition on behalf of himself and other persons similarly situated in the City of Midland, Precinct No. 1, Midland County, Texas, and states that he is a resident, taxpayer, and legally qualified voter and elector of the City of Midland, Precinct No. 1, Midland County, Texas, and that, as such, he is legally qualified to vote for municipal, precinct and county offices in Midland County, Texas."

The right which he sought was as follows:

> "The Plaintiff has a right and interest to see that *his* civil rights and liberties and in particular *his* right and interest in an equitable apportionment of voting power for members of the Commissioners Court are protected in accordance with the terms of the Texas Constitu-

tion and Section 1 of the 14th Amendment to the Constitution of the United States."

The pleadings in this case upon which Avery went to trial are completely void of allegations which would qualify as a class action. The petition fails to comply with any of the provisions of Rule 42,[2] Texas Rules of Civil Procedure. Only a quick glance at the rule is required to conclude that Avery does not seek to qualify under subdivision (1) of the rule, because the rights which he seeks to enforce are *his* rights and liberties and *his* right to equitable voting power. Such right is not joint or secondary and on its face could not be the proper subject of a class action under subdivision (1) of the rule. Subdivision 2 is out, because there is no specific property involved in this action. Avery's petition fails to qualify him as representing a class, in that it fails to state that

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2. "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, in behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it. Amended by order of September 20, 1941, effective December 31, 1941."

there are persons constituting a class. The petition on which he went to trial does not allege that there are other persons having a common interest with Avery in an adjudication of a common question of fact or law. In fact, the record shows that public officials and many others who publicly refused to support Avery, were all citizens of Midland. The evidence and the proceedings fail to show any support of Avery's position from the City of Midland or the residents of the City as a group. The petition does not describe any identifiable class of persons nor state or show that they are so numerous as to make their joinder in the suit impracticable. There is nothing in the petition to show that there are others "similarly situated." The pleadings are lacking and Avery produced no evidence to warrant a valid class judgment. See Schenker v. City of San Antonio, Tex.Civ.App., 369 S.W.2d 626 (wr. ref., n.r.e. 1963).

Since the subject matter of Avery's complaints in this Court is the disparity of population, and since that subject is a matter of *public* not *private* concern, and since Avery did not properly allege or prove a class action in the trial court, so as to represent the public, the result is that he never reaches or gets to the question of substantial evidence, abuse of discretion, or his asserted claims to *alternative*[3] relief.

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3. The prayer, reflecting the relief sought, reads as follows:

"Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

"(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said county into

Avery has no standing in this Court to complain of the action of the Court of Civil Appeals on his substantial

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Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

"(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

Commissioners' Precincts for the convenience of the people, giving

"(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election there-

evidence and alternative relief claims. I would dismiss this cause for want of jurisdiction. In no event does the Constitution of the United States or the Texas Constitution require that Midland County be divided into four equally populated precincts. The Court's view, if finally adopted, will lead to great confusion and uncertainty not only in Midland County, but in every county in Texas with citizens who have a desire to substitute their judgment for that of the commissioners courts. It seems to me that this is not the proper case in which to extend the doctrine of the one man-one vote rule to the governing bodies of local governments such as commissioners courts. Perhaps, in a proper case, the federal courts will in the future take jurisdiction under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, but I cannot imagine a situation, much less the one presented in this case, where the Texas Constitution or the case law would warrant a holding that there must be equality of population in Commissioners precincts.

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under and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing so establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters."

APPENDIX "C"

OPINION OF THE COURT OF CIVIL APPEALS

CLAYTON, Justice.

This is a county commissioners' precinct redistricting case, appealed from the judgment of the District Court of Midland County, Texas. Avery, appellee here, brought the suit as a resident property owner, tax payer and qualified voter of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas, "individually and on behalf of other persons similarly situated and qualified" against the County of Midland and its county judge and four county commissioners, appellants here. Plaintiff-appellee's pleadings reflect that, since the time of its incorporation in 1901, the City of Midland, lying virtually in its entirety in Commissioners' Precinct No. 1, has been the only incorporated city, town or village in Midland County. The city's population had grown through the years until at the time of the 1960 Federal Decennial Census its population represented 92.48 per cent of the population of the county, and Precinct No. 1 contained 97.80 per cent of the population of the county. Of the qualified voters of the county in that year, 97.88 per cent resided in Precinct No. 1. Plaintiff asserted that other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of county funds and revenue, etc., were disproportionately distributed among the commissioners' precincts of the county, making the precincts as established "grossly impractical and inconvenient to the people". In September, 1962, plaintiff petitioned the Commissioners' Court for a redistricting of

the county's precincts, but "such petition and request was refused". In that same month this suit was filed to compel a redistricting, invoking the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution, Vernon's Ann.St. During the pendency of this suit, and in July and August, 1963, public hearings were held by the Commissioners' Court on the matter of redistricting the county, during which time plaintiff and others testified or presented plans for such redistricting. On August 31, 1963, plaintiff's pleadings relate, the Commissioners' Court adopted an order, effective January 1, 1964, redistricting Midland County into commissioners' precincts, which order, plaintiff alleges, made only insignificant changes in the boundaries of commissioners' precincts and in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of county roads and other pertinent things among the commissioners' precincts of said county; that in passing said order the commissioners had acted arbitrarily and capriciously, in abuse of their discretion and without regard to the convenience of the people of Midland County or the rights, privileges and guarantees of plaintiff and others similarly situated by the Constitution of the State of Texas and of the United States. Plaintiff prayed that such order of the Commissioners' Court of August 31, 1963 and all prior orders dividing Midland County into commissioners' precincts be set aside and that writ of mandamus issue compelling the defendants to pass a new order giving proper consideration to equality of population and the other factors said by plaintiff to be pertinent in the division of the county into commissioners' precincts.

The presiding judge, who heard the cause without the intervention of a jury, found that Precinct No. 1 had in excess of 95 per cent of the total population of the county under the order of August 31, 1963, and that on the date of such order over 97 per cent of the qualified voters of the county resided in said Precinct No. 1, and that there was a gross disparity of other pertinent factors, such as land area and taxable values in said order as in all previous orders dividing said county into commissioners' precincts; that in passing such order of August 31st the defendants had acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully, in gross abuse of their discretion, and that their action constituted invidious discrimination. The court's judgment further found that the said order was not for the convenience of the people of said county as required by Article V, § 18 of the Constitution of the State of Texas. The judgment of the court set aside said order and all previous orders dividing the county into commissioners' precincts, and ordered that the Commissioners' Court, not later than the next succeeding July or August term of said court, "divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each *will have substantially the same number of people*". (Emphasis supplied).

[1] Appellant Commissioners advanced twelve points of error and appellant Midland County presented two points of error attacking the District Court's order as above set out. We deem it unnecessary to discuss these points separately or at length, but will treat only those assignments which relate to that part of the order underscored above which embodies the mandatory requirement that the county be divided into precincts so that each would have sub-

stantially the same number of people. We are in accord with the assertion by appellant Commissioners that "neither the Constitution of the United States nor the Constitution of Texas, as construed and interpreted by the courts, contains any requirement that county commissioners precincts be equal to each other in population * * *" Article IV, § 4 of the United States Constitution merely provides that "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." Amendment XIV, section 1 provides: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article V, § 8 of the Texas Constitution provides that the district courts "shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; * * *"; and § 18 of the same Article relates to commissioners' precincts:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. * * * Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner * * *. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. * * *"

Among the scant authority in Texas on the subject of establishment of commissioners' precincts is to be found in the 1932 opinion of this court in Lewis v. Harris, 48 S.W. 2d 730, in which a writ of error was refused. This was a redistricting case which arose in Upton County, and we find the facts involved and the language employed so nearly applicable to the case before us as to justify quotation therefrom at some length. The court states:

> "* * * Appellants cite section 18, art. 5, of the State Constitution which, in substance, requires the division of the county 'from time to time, for the convenience of the people, into precincts,' and that the commissioners' precincts shall be four in number.
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> "Disregarding legal conclusions stated therein, the petition here simply shows a state of facts which gives to the town of Rankin and precincts Nos. 1, 2, and 3 a power of control over the commissioners' court of the county out of proportion to their population, voting strength, and taxable values, thereby denying to the town of McCamey and precinct No. 4 the representation upon the court and power of control to which such town and precinct is justly entitled by the population, voting strength, and taxable values thereof.
>
> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution, may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations. This is what the present action seeks to compel. The location of cities

and towns in certain counties is no doubt such that it cannot be conveniently done. From a political viewpoint it is desirable and just that the precincts should be so arranged, but in some instances it is doubtless not practical.

"It is not alleged that a redivision of the county as sought is practical and convenient for the people. Plaintiffs simply base their demand upon population, voting strength, and taxable valuation. The present division is inconvenient in the sense only that the town of McCamey and precinct No. 4 have not the representation upon and control of the commissioners' court to which the plaintiffs say such town and precinct are justly entitled by the population, voting strength, and taxable valuation thereof.

"There is no law imposing upon a commissioners' Court the duty of rearranging the commissioners' precincts of a county upon such a basis, and the writ of mandamus will not lie to compel such action. The demurrers were properly sustained."

The cited case is given recognition in Hatter v. Worst, 390 S.W.2d 293 (Tex.Civ.App., 1965; n.r.e.), although Lewis v. Harris was not controlling on the issue involved in the latter case. An analytical and well-documented discussion of the case now before us is to be found in the Winter, 1965 issue of the Baylor Law Review, Vol. XVII, No. 1, p. 41, written by J. William Davis, which it would be well for the reader of this opinion to review for additional background information on the case before us.

[2, 3] We have come to the conclusion that the judgment of the lower court in the instant case must be reversed. It has been stated here that this judgment orders the Commissioners' Court of Midland County to divide said county into four Commissioners' Precincts "for the

convenience of the people of said County" and in so doing to establish such commissioners' precincts "so that each will have substantially the same number of people". The order thus exceeds the admonition contained in the Texas Constitution that requires only that the division of the county in such precincts be "for the convenience of the people", which, as stated in Lewis v. Harris, supra, cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths and taxable valuations, however desirable, in certain instances, such a division might be. Just as there is no law or constitutional requirement that such a division be made, neither is there authority, in our opinion, for the lower court herein to compel the establishment of commissioners' precincts so that each will have substantially the same number of people. Following this reasoning, the lower court was without authority to enter the order embodied in its judgment, and such judgment must therefore be reversed.

Since this case has been thoroughly tried and expertly briefed by both parties, we feel that no useful purpose would be served by a remand, and this cause is therefore here rendered for the appellants.

Reversed and rendered.

APPENDIX "D"

28 U.S.C. Sec. 1257 (3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX "E"

CONSTITUTION OF STATE OF TEXAS

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

Art. I. Sec. 3

§ 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to

exclusive separate public emoluments, or privileges, but in consideration of public services.

Art. I. Sec. 19

§ 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

APPENDIX "F"

ACTS OF THE TEXAS LEGISLATURE RELATING TO COMMISSIONERS COURT

V.A.C.S. Art. 2339

Article 2339. [2236] [1532] [1509] Election

Each county shall be divided into four commissioners precincts, and one commissioner shall be elected biennially in each precinct, and each commissioner shall hold his office for two years. Const. art. 5, sec. 18; Acts 1876, p. 51, sec. 3; G.L. vol. 8, p. 887.

V.A.C.S. Art. 2340

Art. 2340. [2239] [1535] [1512] Oath and bond

Before entering upon the duties of their office, the county judge and each commissioner shall take the official oath, and shall also take a written oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office. Each commissioner shall execute a bond to be approved by the county judge in the sum of three thousand dollars, payable to the county treasurer, conditioned for the faithful performance of the duties of his office, that he will pay over to his county all moneys illegally paid to him out of county funds, as voluntary payments or otherwise, and that he will not vote or give his consent to pay out county funds except for lawful purposes. Acts 1923, p. 14.

V.A.C.S. Art. 2342

Art. 2342. [2237] [1533] [1510] The Court

The several commissioners, together with the county

judge, shall compose the "Commissioners Court," and the county judge, when present, shall be the presiding officer of said court. Const. art. 5, sec. 18; Acts 1876, p. 51; G.L. vol. 8, p. 887.

V.A.C.S. Art. 2351

2. POWERS AND DUTIES

Art. 2351. [2241] [1537] [1514]. Certain powers specified

Each commissioners court shall:

1. Lay off their respective counties into precincts, not less than four, and not more than eight, for the election of justices of the peace and constables, fix the times and places of holding justices courts, and shall establish places in such precincts where elections shall be held; and shall establish justices precincts and justices courts for the unorganized counties as provided by law.

2. Establish public ferries whenever the public interest may require.

3. Lay out and establish, change and discontinue public roads and highways.

4. Build bridges and keep them in repair.

5. Appoint road overseers and apportion hands.

6. Exercise general control over all roads, highways, ferries and bridges in their counties.

7. Provide and keep in repair court houses, jails and all necessary public buildings.

8. Provide for the protection, preservation and disposition of all lands granted to the county for education or schools.

9. Provide seals required by law for the district and county courts.

10. Audit and settle all accounts against the county and direct their payment.

11. Provide for the support of paupers and such idiots and lunatics as cannot be admitted into the lunatic asylum, residents of their county, who are unable to support themselves. By the term resident as used herein, is meant a person who has been a bona fide inhabitant of the county not less than six months and of the State not less than one year.

12. Provide for the burial of paupers.

13. Punish contempts by fine not to exceed twenty-five dollars or by imprisonment not to exceed twenty-four hours, and in case of fine, the party may be held in custody until the fine is paid.

14. Issue all such notices, citations, writs and process as may be necessary for the proper execution of the powers and duties imposed by such court and to enforce its jurisdiction.

15. Said court shall have all such powers and jurisdiction, and shall perform all such other duties, as are now or may hereafter be prescribed by law. Const. art. 5; Acts 1876, p. 51; G.L. vol. 8, p. 887; Acts 1885, p. 89; G.L. vol. 9, p. 708; Acts 1911, p. 236.

16. Said Court shall have the authority to use county road machinery and funds from the General Fund or Road and Bridge Funds in cleaning streams and in aiding flood control when such improvements are deemed to be of aid of the county in the maintenance and the building of county roads, in counties having a population of from

nineteen thousand, eight hundred and fifty (19,850) to nineteen thousand, eight hundred and ninety-five (19,895) according to the last Federal Census. Added Acts 1939, 46th Leg., Spec. L., p. 588, §1.

17. a. The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is hereby empowered to create a revolving fund or funds and to make appropriations thereto out of the general revenue of such county; and such revolving fund shall be used by such county only in cooperation with the United States Department of Agriculture to aid and assist in carrying out the purposes and provisions of an Act of Congress of the United States pertaining to the distribution of commodities to persons in need of assistance, under the direction of the United States Department of Agriculture; provided, however, that the county shall have on hand at all times either the moneys appropriated to such revolving fund or funds or the equivalent thereof in stamps issued by the United States Department of Agriculture under the Food and/or Cotton Stamp Plan, which stamps are convertible into cash at any time.

b. In such counties of this State exercising the powers herein granted, an issuing officer shall be appointed to carry out the provisions of this Act and to administer the funds herein appropriated. Such issuing officer shall be a citizen of the State of Texas and appointed by the County Judge of such County subject to the approval of the Commissioners Court thereof. He shall be required to furnish a good and sufficient surety bond in such amount and upon such terms and conditions as may be required by the Commissioners Court and the United States Department of Agriculture. Such issuing officer shall receive a salary, to be paid out of the general fund or any other fund of the

county, except constitutional funds, not otherwise appropriated, not to exceed Two Hundred Dollars ($200) per month, and may appoint such cashiers and other assistants as may be authorized by such Court. The premiums of all bonds which may be required of such issuing officer, cashiers or other assistants, shall be paid by the Commissioners Court out of any available funds therefor belonging to such county.

c. Provided however the powers herein granted to such counties may be exercised by two (2) or more counties in conjunction with each other and in cooperation with the United States Department of Agriculture. And when such powers are exercised by two (2) or more counties jointly, the County Judges of such counties shall appoint the issuing officer, fix such appointee's bond and to do all other things necessary to cooperate with the United States Department of Agriculture in the same and like manner as is herein granted to any one county of this State.

d. Provided that such Commissioners Courts of such counties may cooperate with any incorporated city or town within such county or counties on such conditions and requirements as may be promulgated by such Commissioners Court or Courts.

e. Whenever any county herein authorized to create such a revolving fund ceases to participate therein the issuing officer appointed under the provisions hereof shall forthwith reduce all stamps to their equivalent in money and return such moneys then on hand to the fund from which same was originally appropriated, and render a full account of his administration thereof to the Commissioners Court or Courts as the case may be. Added Acts 1941, 47th Leg., p. 204, ch. 146, §1.

18(a) The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is empowered in all cases where said county has heretofore acquired, or may hereafter acquire, land for an airport through purchase or gift from any person or source whatever, including the Federal Government, or any agency thereof, to lease said land and/or the facilities thereof, or any part thereof to any person or corporation upon such terms as the Commissioners Court shall deem advisable for airport purposes, or other purposes, provided any such lease is not inhibited by the terms of the grant to such county. Said counties through such Commissioners Courts are also hereby expressly authorized and empowered to contract with reference to oil, gas or other minerals or natural resources which may be vested in said counties by virtue of the ownership of such airports and to execute and deliver to any person upon such conditions and for such consideration, including oil payments, gas payments, overriding royalties, etc. as the Commissioners Court may deem advisable, mineral deeds or mineral leases of all or any part of said minerals, or the rights thereto, which are vested in the county and to generally contract for the exploration and development of the minerals underlying said land or any part thereof.

(b) The proceeds from the sale of any minerals or mineral rights, or the consideration for the execution of any mineral leases, including cash bonuses, delay rentals and royalties, need not be devoted to the maintenance, upkeep, improvement and operation of such airport, but may be expended by the Commissioners Court for any lawful purpose.

(c) The proceeds received, or to be received from any person from the lease of the surface of said land, or from

the lease of the facilities thereof, or any part thereof, for purposes other than airport purposes, or for purposes other than those relating to the operation of an airport, may likewise be expended by the Commissioners Court for any lawful purpose.

(d) The proceeds received, or to be received, from any person for any lease of the surface of said land, or for the lease of the facilities thereof, or any part thereof, for airport purposes, or for purposes related to the operation of an airport, shall be devoted, first, to the maintenance, upkeep, improvement and operation of such airport and the facilities, structures and improvements thereof, but any surplus remaining at the close of any fiscal year of operation may be expended by such Commissioners Court for any lawful purpose.

(e) The proceeds received, or to be received, from any charges for the use of said airport for airport purposes shall be devoted, first, to the maintenance, upkeep, improvement and operation of such airport and the facilities, structures and improvements thereof, but any surplus remaining at the close of the fiscal year of operation may be expended by the Commissioners Court for any lawful purpose. Added Acts 1949, 51st Leg., p. 503, ch. 276, §1.

19(a) The Commissioners Court of each county of this State, in addition to the powers already conferred upon it by law, is expressly authorized and empowered to contract with the United States Government, or with any agency thereof, and particularly with the Federal Works Administrator, the Housing and Home Finance Administrator, and/or the National Housing Adminstrator, or their successor or successors, for the acquisition of any land, or interest in land, in such county, owned by the United States Government, or any agency thereof, and for the

acquisition of any temporary housing on land which the United States Government, or any agency thereof, may own or control; and each such county in this State is authorized and empowered to acquire by purchase, gift or otherwise, any such land and any such housing from the United States Government, or any agency thereof, and to own and operate such land and housing.

(b) Each Commissioners Court in this State is authorized and empowered to adopt a resolution or order requesting the transfer to said county of any such land or housing, or interest therein, which the United States Government, or any agency thereof, is now, or may be hereafter, authorized to convey or transfer to such county, and each such county, through its Commissioners Court, is expressly authorized and empowered to bind itself to comply with any and all terms and conditions which the United States Government, or any agency thereof, may impose as a prerequisite to the transfer or conveyance of any of such land or housing, or either of them, or any interest therein; and any instrument or deed conveying to said county any such land or any such housing, or any interest therein, may contain any conditions and provisions, covenants and warranties which may be prescribed by the United States Government, or any agency thereof, and agreed upon by said county acting through its Commissioners Court, provided that such terms and conditions are not inhibited by the Constitution of the State of Texas.

(c) For the purpose of purchasing or otherwise acquiring said lands or housing, or both, and improving, enlarging, extending or repairing the same, the Commissioners Court of any county may issue negotiable bonds of the county and levy taxes to provide for the interest and sinking funds of any such bonds so issued, the authority hereby given

for the issuance of such bonds and the levying and collection of such taxes to be exercised in accordance with the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of Texas, 1925, as amended.

(d) Counties are expressly authorized and empowered to lease or rent any lands, housing, or facilities acquired by them pursuant to this Act and to establish and revise the rent or charges therefor; to arrange or contract for the furnishing by any person or agency, public or private, of services, or facilities for, or in connection with, any of such lands, housing or facilities, or the occupants thereof;

(e) Said counties are further authorized to sell and convey all or any part of the land or housing so acquired or to lease or exchange same; and said counties are further expressly authorized to execute oil, gas or mineral leases covering all or any part of said lands so acquired on such terms and conditions as may be deemed advisable by the Commissioners Court and for such consideration, including oil payments, gas payments, overriding royalties, etc. as may be deemed advisable; and such counties, through their Commissioners Courts, are expressly authorized and empowered to execute conveyances of minerals or mineral rights, and to generally contract for the exploration and development of the minerals underlying said land, if any, or any part thereof. Added Acts 1949, 51st Leg., p. 501, ch. 275, § 1.

20. The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is authorized and empowered in all cases where such county has acquired a water supply from subterranean waters for county purposes, to sell, contract to sell and deliver any or all of such water which is not needed for

county purposes to any public or municipal corporation, or political subdivision of this State, including any water control and improvement district, or fresh water supply district now created and existing, or which may hereafter be created under the laws of this State; any such water sold or contracted to be sold and delivered to any such public or municipal corporation or political subdivision of this State, may be used or re-sold for any lawful purpose; and said Commissioners Court shall have the right to fix and determine the rate or rates at which such water shall be sold to any such public or municipal corporation or political subdivision of this State, and to enter into contracts to sell and supply such water at such determined rate or rates for any term of years not exceeding forty (40); and all monies received by the county from the sale of such water shall be placed to the credit of the General Fund of the county and may be expended for general county purposes as now or hereafter permitted by law. Added Acts 1950, 51st Leg., 1st C.S., p. 87, ch. 24 § 1.

V.A.C.S. Article 2352

Art. 2352. [2242] [1538] May levy taxes

Said court shall have the power to levy and collect a tax for county purposes, not to exceed twenty-five cents on the one hundred dollars valuation, and a tax not to exceed fifteen cents on the one hundred dollars valuation to supplement the jury fund of the county, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment to the Constitution, September 25, A.D. 1883, and for the erection of public buildings, streets, sewers, water works and other permanent improvements, not to exceed twenty-five

cents on the one hundred dollars valuation in any one year, and except as in the Constitution otherwise provided. They may levy an additional tax for road purposes not to exceed fifteen cents on the one hundred dollar valuation of the property subject to taxation, under the limitations and in the manner provided for in Article 8, Sec. 9, of the Constitution and in pursuance of the laws relating thereto. Const. art. 8, sec. 9; Amendment 1899.

V.A.C.S. Article 2352d

Art. 2352d. Appropriations for advertising and promoting growth and development by home rule cities and counties; Board of Development

Appropriation

Section 1. All counties in the State of Texas may appropriate from the General Fund of said counties an amount not exceeding Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation for the purpose of advertising and promoting the growth and development of such county; providing that before the Commissioners Court of any county may appropriate any sums for such purpose, the qualified taxpaying voters of said county shall, by a majority vote of the persons voting at such election, authorize the County Commissioners to thereafter appropriate not to exceed Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation.

Board of Development Fund; budget

Sec. 2. The amount of money approved by the Commissioners Court for the Board of Development shall constitute a separate fund to be known as the Board of Development Fund and shall not be used for any other

purpose. Each claim against the Board of Development shall be authorized and approved by the Board of Development before presented for payment and after such approval, shall be presented to the Commissioners Court and acted upon as all other claims against the Commissioners Court.

The Board of Development hereinafter provided for shall annually in advance, prepare and submit to the Commissioners Court a budget for the ensuing year in the same manner as required of counties. The money appropriated annually shall be governed by the discretion of the Commissioners Court, but in no event shall said sum be in excess of Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation.

Board of Development

Sec. 3. There is hereby created, in counties qualifying under this law, a Board of Development, which shall devote its time and effort for the purpose of advertising and promoting the growth and development of any such county. The Board of Development shall be authorized to expend any sums reasonably necessary to accomplish its purposes for personnel, rent, and materials, subject to the approval of the Commissioners Court.

The Board of Development shall consist of five (5) members, to be appointed by the Commissioners Court; said members shall serve for a period of two (2) years from their appointment, without compensation and until their successors are appointed and accept said appointment. Vacancies on such Board shall be filled by the Commissioners Court in the same manner as the original appointment.

Law as cumulative; maximum appropriation

Sec. 4. This law shall be cumulative of all other laws authorizing counties to appropriate money, or to levy a tax for advertising and promotional purposes, and counties shall have the option of operating under any one applicable law, but in any event, the maximum amount of money which can be appropriated for such purpose shall not exceed the limits herein fixed.

Appropriations validated

Sec. 5. Any sums heretofore appropriated or expended for advertising or promotional purposes under any such previous Acts are hereby validated. As amended Acts 1951, 52nd Leg., p. 359, ch. 224, § 1; Acts 1955, 54th Leg., p. 899, ch. 351, § 1.

V.A.C.S. Article 2354

Art. 2354. [2244] [1540] [1517] When tax levied

No county tax shall be levied except at a regular term of the court, and when all members of said court are present. Id.

V.A.C.S. Article 2356

Art. 2356. [2252-3] Bridges in corporate limits

Said court may erect bridges within the corporate limits of any city or town to the same extent and under the same conditions now prescribed by law for the construction of bridges outside the limits of any city or town. Said court and the governing body of any city or town may co-operate in the erection of a bridge within the corporate limits of a city or town, and jointly erect such bridge

upon terms and conditions mutually agreed upon; and either or both the city and county may issue its bonds to pay its proportionate part of the debt by complying with the requirements of the law regulating the issuance of bonds by counties and cities and towns. Acts 1895, p. 164; G.L. vol. 10, p. 894.

APPENDIX "G"

UNITED STATES CONSTITUTION, Amendment XIV, § 1:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "H"

JUDGMENT OF SUPREME COURT OF TEXAS (OMITTING INTRODUCTORY PORTION)

". . . it is, therefore, adjudged, ordered and decreed that the judgments of the District Court and Court of Civil Appeals be, and hereby are, reversed and set aside, and that this cause be, and hereby is, remanded to the District Court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process."

FILED
FEB 1 1967
JOHN F. DAVIS, CLERK

No. 939

In the

Supreme Court of the United States

OCTOBER TERM, 1966

HANK AVERY,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al.,

Respondents.

REPLY OF THE RESPONDENTS J. C. BROOKS, CLARK MORELAND AND LOUIS OSBORNE TO PETITION FOR WRIT OF CERTIORARI

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WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

No. 958

In the

Supreme Court of the United States

OCTOBER TERM, 1966

HANK AVERY,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al.,

Respondents.

REPLY OF THE RESPONDENTS J. C. BROOKS, CLARK MORELAND AND LOUIS OSBORNE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

To the Honorable Justices of the Supreme Court of the United States:

Alvey A. Bryant, Clark Moreland and Louis Osborne were Respondents in this cause in the Supreme Court of Texas, and at that time were the incumbent County Commissioners

of Precincts 2, 3, and 4, respectively, of Midland County, Texas. Since the final judgment in the Supreme Court of Texas, and prior to the filing of the Petition for Writ of Certiorari in this Court, the term of office of the Respondent Alvey A. Bryant has expired, and J. C. Brooks is the presently incumbent Commissioner from Precint No. 2, Midland County, Texas, and he joins in this Reply to said Petition.

GROUNDS FOR OPPOSITION OF THE PETITION

A. The Petition fails to state a substantial Federal question because the arrangements made by the State of Texas as to the composition and control of its local subdivisions and municipal corporations do not infringe any rights guaranteed to Petitioner by the United States Constitution.

Over many years, and in various aspects and in different contexts, parties have come before this Court complaining of actions of States with reference to their local subdivisions, governmental units, districts or municipalities as infringing the parties' rights under the United States Constitution. *Soliah v. Heskin*, 222 U.S. 522, 32 Sup. Ct. 103; *Board of Laramie v. Board of Albany*, 92 U.S. 307, 23 Law Ed. 552; *Mobile County v. Kimbell*, 102 U.S. 691, 26 Law Ed. 238; *Hunter v. Pittsburgh*, 206 U.S. 161, 28 Sup. Ct. 40; *Higginbotham v. Baton Rouge*, 306 U.S. 535, 59 Sup. Ct. 705; *Minor v. Happerset*, 21 Wall 162, 22 Law Ed. 627; *Mason v. Missouri*, 179 U.S. 328, 21 Sup. Ct. 125; and *Breedlove v. Settles*, 302 U.S. 277, 50 Sup. Ct. 205.

The principle to be derived and distilled from these prior decisions of this Court is that, in our Federal system, the States have absolute control over their political subdivisions, local governmental units, and municipal corporations, and of the officials who serve in such units. Without any restraints imposed by the United States Constitution, the States may, through their various governmental processes, create as many or as few subdivisions and municipalities as they please, and may create such subdivisions of whatever size or shape, and may delegate to them such of the state power as the individual States may deem appropriate. Under these decisions, the States may create, abolish, or merge such subdivisions and municipalities at will, may provide for their administration by any type of officials, and may provide the selection of such officials by appointment, or election, or may abolish the offices altogether.

Consistent with these decisions, this Court has in recent years twice refused to entertain, because they did not raise a substantial Federal question, appeals complaining of a disparity of population or voting strength as between the precincts, wards, or other areas from which the officials are chosen to administer the affairs of local governmental subdivisions or municipalities. *Tedesco v. Board of Supervisors*, 339 U.S. 940, 70 Sup. Ct. 797; *Glass v. Hancock County Election Commission*, 378 U.S. 558, 84 Sup. Ct. 1910, 12 Law Ed. 2d 1035.

The decision of the Supreme Court in Texas in this case is consistent with and follows the prior rulings of this Court

and does not infringe or deny any of Petitioner's Federally guaranteed Constitutional rights.

B. The Petition fails to state a substantial Federal question because the opinion and decision of the Supreme Court of Texas leaves Petitioner free to assert his claim in the State Courts under State Law.

The gravamen of Petitioner's complaint is that the County Commissioners' Redistricting Order of August 31, 1963, provides for, or permits, unlawful domination of the government of Midland County, Texas, by a small minority of rural voters. The "QUESTION PRESENTED" on page 3 of the Petition does not even attempt to pose a case of infringement of Petitioner's personal rights guaranteed to him under the United States Constitution, but, instead, calls into question generally whether the population disparity is an unlawful distribution of power under the United States Constitution in the county government. The same question arises under the State Constitution, and the Supreme Court of Texas has already determined that question in Petitioner's favor, or at least in a way which permits him hereafter to pursue further in the State Courts under State law the question of the distribution of governmental powers in Midland County, Texas. Since the redistricting order has been held to violate the Texas Constitution, the Federal question is not reached.

The decision and mandate of the Supreme Court of Texas is that the cause be "reversed and remanded to the District Court for further proceedings in accordance with this opinion". Under the State practice, this amounts to a gen-

eral remand, reopening the cause in the State District Court for a new trial on all issues. *Rule 503*; Texas Rules of Civil Procedure; *First State Bank of Bishop v. Grebe*, 162 S.W. 2d 165 (err. ref. w.o.m., 1942); *Seydler v. Krueger*, 133 S.W. 2d 189 (err. ref., 1939).

Petitioner's complaint, as stated under "QUESTION PRESENTED", is that the Redistricting Order of August 31, 1963, creates an unlawful distribution of power within the government of Midland County, Texas. The Supreme Court of Texas has agreed with Petitioner and held that it does, basing its holding on the Constitution of the State of Texas, Article V, Section 18. The Supreme Court of Texas has remanded the cause for further proceedings in the State Courts, in which Petitioner will be left free to assert his contentions and possibly bring to an end the rural domination of which he complains without creating *equally populated* Commissioners Precincts, and thus without ever reaching any Federal constitutional question of "one man—one vote."

Since the case has been decided under State law in a way which permits Petitioner to seek further relief under State law without reaching any Federal question, the Petition fails to state a substantial Federal question and should be dismissed. *Henry v. Mississippi*, 379 U.S. 443; 85 Sup. Ct. 564; 13 Law Ed. 2d 408; *Wolfe v. North Carolina*, 364 U.S. 177; 80 Sup. Ct. 1482; 4 Law Ed. 2d 1650.

The above noted difference in the handling of the case by the Supreme Court of Texas distinguishes this Petition

from the appeals entertained by this Court on December 5, 1966, in No. 430, *Sailors v. Board of Education of Kent County;* No. 491, *Board of Supervisors of Suffolk County v. Bianchi;* and No. 624, *Moody v. Flowers.* In none of those cases were the appealing parties afforded an opportunity to seek redress of their grievance in further proceedings in the State Court under State law. In this case Petitioner has been afforded such opportunity, for which reason the action of this Court in entertaining the above mentioned appeals is not a precedent or basis for granting the writ in this case.

PREMISES CONSIDERED, Respondents pray that the Petition be in all things denied.

Respectfully submitted,

Frank Stubbeman

Frank Stubbeman

F. H. Pannill

F. H. Pannill

W. B. Browder Jr

W. B. Browder

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Of Counsel.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing reply has been served on Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

William A. Olson
City Attorney
City Hall
Houston, Texas

Dated this ..... day of January, 1967.

F. H. Pannill

F. H. Pannill

FEB 10 1967
JOHN F. DAVIS, CLERK

No. ~~958~~ 39

In the
Supreme Court of the United States
OCTOBER TERM, 1966

HANK AVERY,
Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al.,
Respondents.

OPPOSING BRIEF OF RESPONDENT, MIDLAND COUNTY, TEXAS

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Argument for Protection of the Position of Respondent Midland County	4
Conclusion	5
Appendix A (Opinion of Supreme Court of Texas)	A-1
Appendix B (Dissenting Opinion)	B-1
Appendix C (Opinion of the Court of Civil Appeals)	C-1
Appendix D (Constitution of State of Texas)	D-1
Appendix E (Acts of the Texas Legislature)	E-1

Page

Cases

Avery v. Midland County, 397 S.W. 2d 919 (Tex. Civ. App.) 2

Avery v. Midland County, 406 S.W. 2d 422 (Tex. Sup. Ct.) 2

Reynolds v. Sims (1964), 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 4

Sailors v. Board of Education of the County of Kent, 254 F. Supp. 17 (1966) 5

State ex rel Sonneborn v. Sylvester, 132 N.W. 2d 249, 258 (Wisconsin Sup. Ct., 1965) 5

Constitution of State of Texas

Article V., Sec. 8 2

Article V., Sec. 18 2

Revised Civil Statutes of Texas

Article 1908 3

Article 2.04 of the Texas Election Code 3

No. 958

In the

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HANK AVERY,

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Respondents.

OPPOSING BRIEF OF RESPONDENT, MIDLAND COUNTY, TEXAS

According to the Petition herein, the judgment of the state District Court, which was set aside by the state Supreme Court, had granted to Petitioner the relief he sought by directing that the "one-man, one-vote" principle be applied to certain of the political subdivisions of Midland County, Texas, known as County Commissioners Precincts.

Respondent Midland County, Texas, a governmental entity, does not argue for or against a reapportionment or redistricting of its Commissioners Precincts, but must leave that task to Petitioner and the other Respondents.

However, Respondent Midland County, Texas, prays that if a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas and a reapportionment or redistricting be ordered, that any remedy directed to effect such order be such that will not disrupt the orderly operation of the government of Midland County. Therefore, the purpose of this brief is to advise this honorable Court of the limited but vital interests of Midland County as they might be affected upon review by this Court.

OPINIONS BELOW

The majority opinion of the Supreme Court of Texas is unofficially reported at 406 S.W. 2d 422, and appears herein as Appendix A at p. A-1. The dissent is reported at 406 S.W. 2d 429, and appears herein as Appendix B at p. B-1. The unofficial report of the opinion of the Court of Civil Appeals appears at 397 S.W. 2d 919, and appears herein as Appendix C at p. C-1.

JURISDICTION

Respondent Midland County does not take a position concerning jurisdiction to review the judgment of the Supreme Court of Texas.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Texas Constitution: Article V., Section 8, and Article V., Section 18, Vernon's Annotated Texas Constitution, which are set forth herein in Appendix D at p. D-1.

The following enactments of the Texas Legislature: Article 1908, Vernon's Annotated Texas Statutes, and Article 2.04 of the Texas Election Code, Vernon's Annotated Texas Statutes.

QUESTIONS PRESENTED

If this honorable Court should decide that the 14th Amendment requires it to enter an order directing a reapportionment of the Commissioners Court of Midland County, Texas, or a redistricting of the Commissioners Precincts of Midland County, Texas, then the questions of remedy which concern this Respondent are:

1. Whether such decision of this Court should have a prospective effect only upon the constitutionality of the government of Midland County, Texas;

2. Whether such decision of this Court should provide for the uninterrupted and orderly operation of the government of Midland County, Texas, while such reapportioning or redistricting is being accomplished.

STATEMENT OF THE CASE

Petitioner brought this action against Respondents to set aside an order of the Commissioners Court, which was entered on August 31, 1963, to be effective as of January 1, 1964, dividing the County into four new Commissioners Precincts. (Tr. 345). Petitioner further sought to have said Respondents directed to redistrict said County into Commissioners Precincts having substantially an equal number of people. The Trial Court granted this relief by its final judgment of September 11, 1963 (Tr. 345), setting aside, in

all things, all orders of the Commissioners Court entered prior to September 11, 1963, which divided said County into Commissioners Precincts, and ordered the Commissioners Court to take action not later than its July or August term of 1965, to divide the County into four Commissioners Precincts for the convenience of the people of the County and so that each of said precincts would have substantially the same number of people. (Tr. 348).

By setting aside such orders of the Commissioners Court, the effect of the Trial Court's order would have left Midland County without any Commissioners Precincts until new ones could be established. Also, since the orders of the Commissioners Court that were set aside "in all things" provided for the establishment of Election Precincts (as well as Commissioners Precincts), this would have left the County without Election Precincts until new ones could be established, and would have interfered with the election process.

The subsequent appeal to the Appellate Courts has stayed the effect of the Trial Court's orders. The Supreme Court of Texas ordered a redistricting but directed that it be done "at a time not to interfere with the 1966 general election process" (of Midland County).

ARGUMENT FOR PROTECTION OF THE POSITION OF RESPONDENT MIDLAND COUNTY

This Court in *Reynolds v. Sims* (1964), 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362, recognized the importance of providing for the orderly operation of government as it might be affected by a redistricting or reapportionment process.

Our Federal Courts and State Courts have likewise recognized this problem and have made provisions for its solution. *Sailors v. Board of Education of County of Kent*, 254 F. Supp. 17 (1966); *State ex rel Sonneborn v. Sylvester*, 132 N.W. 2d 249, 258 (Wisconsin, 1965).

CONCLUSION

Wherefore, Premises considered, Respondent Midland County prays that if the writ of Petitioner be granted and the judgment of the Supreme Court of Texas be reviewed, that upon such review, if a reapportionment or redistricting be ordered, that this Court's decision protect the constitutionality of the government of Midland County, Texas, and provide for the uninterrupted and orderly operation of the government of Midland County while such reapportioning or redistricting is being accomplished.

Respectfully submitted,

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APPENDIX "A"

Opinion of Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11272.

HANK AVERY,

Petitioner,

From Midland County, Eighth District.

v.

MIDLAND COUNTY, TEXAS, et al.,

Respondents.

Article V, Section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one county commissioner . . ." This case presents for decision the question of the constitutional validity of such division in Midland County, Texas. The county was last redistricted by order of its commissioners court dated August 31, 1963, effective January 1, 1964. This suit by Petitioner, a resident property owner, taxpayer and qualified voter of Precinct No. 1, Midland County, attacks the division and seeks a redistricting. The judgment of the trial court set aside the current and previous orders dividing Midland County into commissioners precincts and ordered a redistricting of the county on the basis of equality of population in the precincts. The Court of Civil Appeals reversed the judgment of the trial court and rendered a take-nothing judgment against Petitioner. 397 S.W. 2d 919.

We reverse the judgments below and remand the case to the trial court for further proceedings.

The findings of the trial court in its judgment, and the decretal portions thereof, will be helpful to an understanding of our holding and disposition of the cause. We quote from the findings of the trial court:

> ". . . Further, that on the date [August 31, 1963] of such Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining population of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters . . . resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County. . . .
>
> "The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting any division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the principal purposes of Defendants . . . in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect the majority of the members of the Commissioners' Court of said County.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County . . . was not for the convenience of the people of Midland County . . . ."

The decretal portions of the judgment, however, were as follows:

"IT IS, THEREFORE, ADJUDGED AND DECREED by the Court that the order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that not later than the next succeeding July or August term of the Commis-

> sioners' Court of Midland County, Texas, that said Commissioners' Court . . . divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people."

Petitioner attacks the current and prior orders of the commissioners court dividing Midland County into commissioners precincts as invalid under Article V, Section 18, Article I, Section 3, and Article I, Section 19, of the Texas Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution, because of the gross population disparity. He argues that these constitutional provisions require equality of population in the precincts. Respondents assert, on the other hand, that Petitioner did not state or show a cause of action, or establish a justiciable interest or right to bring this suit as representative of a class, because equality of population in the precincts is not required but only that the precinct division be for the convenience of the people in the terms of Article V, Section 18, of the Texas Constitution.

Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights. Cf. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. ed. 2d 663 (1962); *Stovall v. Shivers*, 129 Tex. 256, 103 S.W. 2d 363 (1937); *Dubose v. Woods*, 162 S.W. 3 (Tex. Civ. App. 1913, no writ hist.). We agree with the holding of the trial court that the current order of the commissioners court redistricting Midland County is not supportable under the requirements of the Texas and the United

States Constitutions for the reasons stated by the trial court in its judgment findings. We are not in agreement, however, with the judgment of the trial court to the extent that it orders a redistricting of the county on the sole basis of equality of population.

Article V, Section 18, of the Texas Constitution provides:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts . . . Divisions shall be made by the Commissioners Court provided for by this Constitution. . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article I, Section 3, reads as follows:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The county is a subordinate and derivative branch of state government. Its governmental body is the commissioners court composed of the four county commissioners with the county judge as the presiding officer. See Articles 2351 et seq., Vernon's Ann. Civ. Stats., for an enumeration

of the statutory powers and duties of the commissioners court. The appellation "court" is a misnomer in the accepted meaning of the designation. See 11 Tex. L. Rev. 518 (1933). The commissioners are elected by the qualified voters of the precincts; the county judge is elected by the qualified voters of the entire county. The primary function of the commissioners court is the administration of the business affairs of the county. See *Ehlinger v. Clark*, 117 Tex. 547, 8 S.W. 2d 666 (1928). Its legislative functions are negligible and county government is not otherwise comparable to the legislature of the state or to the Federal Congress, where the "one man one vote" principle is asserted in its most exacting and compelling sense. See *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964)[1]; *Westberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. ed. 2d 481 (1964); *Gray v. Sanders*, 372 U.S. 868, 83 S. Ct. 801, 9 L. ed. 2d 821 (1963). *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. ed. 2d 663 (1962).

This Court has not written upon the specific duty of the commissioners court under Article V, Section 18, to divide the county from time to time into four commissioners pre-

[1] "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 52 L.ed. 151, 159, 28 S. Ct. 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." Reynolds v. Sims, supra, 377 U.S. at 575.

cincts for the convenience of the people. There are four cases in which the Courts of Civil Appeals have done so: *Lewis v. Harris*, 48 S.W. 2d 730 (Tex. Civ. App. 1932, writ ref.); *Ward v. Bond*, 10 S.W. 2d 590 (Tex. Civ. App. 1928, no writ hist.); *Williams v. Woods*, 162 S.W. 1031 (Tex. Civ. App. 1914, no writ hist.); *Dubose v. Woods*, 162 S.W. 3 (Tex. Civ. App. 1913, no writ hist.). In *Harris*, 20 per cent of the people of the county elected three of the four commissioners and the taxable values in the one precinct containing 80 per cent of the population substantially exceeded those of the three other precincts combined. The suit was for a mandamus to compel a redistricting. It was held that such facts did not show that the discretion of the commissioners court had been abused by arbitrary action, the court saying:

> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations . . ."

Ward v. Bond considered a division order redistricting the county into new commissioners precincts equal in area but unequal in population to the extent that 54.5 per cent of the voters elected one commissioner, with 45.5 per cent electing the other three commissioners. The Court of Civil Appeals affirmed the action of the trial court sustaining the

division order. The Court stated that disparity in population was not a sufficiently serious consideration to justify a reversal of the trial court judgment but pointed out that the disparity in population would shortly disappear as the result of the construction of a railroad through the county. The Court also sought to distinguish the *Dubose* and *Williams* cases on the ground that the new division lines in these cases practically deprived some voters of their right of franchise.

The *Williams* and *Dubose* cases were sequels and county districting orders were held invalid in each case. In *Williams*, Dunn County was divided in such manner that 500 voters would elect two commissioners and 120 voters would elect two commissioners. There was a similar disparity in area. It was recognized by both parties that the precincts had been divided along ethnic lines, the Court saying:

> "The great disparity in acreage and population is sought to be justified only on the ground that the county should be so divided as to give the Anglo-Saxons a part of the precincts and the Mexican population the others. Convenience of the voter did not enter the consideration of the Court, but divisions of the territory were made that would tend to foment strife among citizens of different races."

Dubose involved a division of Dunn County under which 500 voters elected one commissioner and 140 voters elected the remaining three commissioners, together with similar disparity in area and public roads. Moreover, the precincts were drawn so as to deprive two towns in the county of polling places where they had been located for the past

thirty years. The Court said: "The facts alleged in the sworn petition show conclusively that as to neither class of precincts is the division of the county one which is convenient to the people of said county; and in fact such division is so arbitrary and wrong that the court should not for a moment tolerate the same . . . When considered as commissioners precincts, it is manifest that wrong was committed in making the districts largely disproportionate as to acreage and population . . . The government of the county will be taken away from the majority of the voters . . ."

The requirements of Article V, Section 18, of the Texas Constitution are to be construed and enforced consistently with Article I, Section 3, commonly referred to as the equal rights or equal protection clause of the Texas Constitution. Cf. *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S.W. 2d 1022 (1942). Equal protection of laws is not secured if persons are deprived of equality in political rights or otherwise subjected to an arbitrary exercise of governmental powers. See *Burroughs v. Lyles*, 142 Tex. 704, 181 S.W. 2d 570 (1944); *Mumme v. Marrs*, 120 Tex. 383, 40 S.W. 2d 31 (1931); *Glasgow v. Terrell*, 100 Tex. 581, 102 S.W. 98 (1907). This Court considered the terms "convenient" and "convenience of the people" appearing in Article V, Section 18, in *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263 (1922), involving an order of the commissioners court creating an additional justice of the peace precinct. Two principles relevant here were there recognized, namely, that in discharging the requirements

of Article V, Section 18, the commissioners court was given some discretion to meet the "changing needs of the people" but such must be "exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion."

The basic problem of Texas counties in the respects under review is the extent of political power which the metropolitan areas should have in relation to the rural areas. The very fact of population concentration enables the city voters to elect the county-wide officers. We recognized in *Pritchard & Abbott v. McKenna,* 162 Tex. 617, 350 S.W. 2d 333 (1961), that the county commissioners court is not charged with the management and control of all of the county's business affairs; and that the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp. The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But

developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

As we have said, equal rights and equal protection of laws require equality in political rights and there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which he ordered a redistricting to achieve substantial equality of population.

We agree with the holding of the trial court that there is obvious arbitrariness in the current districting order here

under attack because of the patent malapportionment of the commissioners precincts of Midland County. The judgment findings of the trial court show the absence of any rational basis therefor.

We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States[2] Constitutions do not require a commissioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the existence and effect of other relevant factors such as those we have mentioned. But neither this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. In no event is a population disparity sustainable against a showing of discrimination, fraud, arbitrariness or abuse of discretion.

The judgments of the Court of Civil Appeals and of the trial court are reversed and the cause is remanded to

[2] "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 1, United States Constitution. See *Tedesco v. Board of Supervisors*, 43 So. 2d 514 (La. App.), appeal denied, 339 U.S. 940, 70 S. Ct. 797, 94 L. ed. 1357 (1960), and the clarification in *Baker v. Carr*, 369 U.S. at 235, of the dismissal of the appeal in *Tedesco* for want of a substantial Federal question, to wit, there was a rational justification for the population disparity in the districting of city council seats.

the trial court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

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Zollie Steakley
Associate Justice

Associate Justice Hamilton not sitting

Associate Justice Smith dissenting.

Opinion delivered

July 13, 1966.

APPENDIX "B"

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. I would affirm the judgment of the Court of Civil Appeals. This is not a "one man-one vote case," nor is there any constitutional requirements for equality in commissioners precincts. Article V, Section 18[1] of the Texas Constitution governs the organization of commissioners precincts. It is well settled by Texas cases that the phrase "for the convenience of the people" in said Article, confers on commissioners courts the discretion to divide precincts in some physically convenient way, and that there is no requirement for equality of population, and no duty to provide precincts which are equal in population. This is an "abuse of discretion case," the only question before this Court being whether a single private citizen, as here, has a vested right and cause of action to revise and review a commissioners court precinct order to achieve equali-

[1] "Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954."

ty in population. The trial court in its judgment, made several findings of fact, as the Court has indicated, but the decretal portion of the judgment only relates to the finding in regard to population disparity. The judgment directs the commissioners court to use equal distribution of population as the dominant factor in redistricting the County. The judgment rendered by this Court is meaningless. If the Court remands the cause generally for a new trial, citizen Avery has accomplished nothing. On the other hand, if the judgment of the trial court striking down the commissioners court order is upheld, still nothing has been accomplished, except to create additional chaos and confusion. This is true, because Avery, as a single individual and private citizen, has no right or standing in court to question the way the government is run or organized, including the location of commissioners precinct boundaries in Midland County, Texas, unless and until he can show some personal loss, damage or harm to his private interests resulting from the governmental operation. See Meredith v. Sharp, Tex. Civ. App., 256 S.W. 2d 870 (1953 writ refused, no reversible error) with Per Curiam opinion, 152 Tex. 437, 259 S.W. 2d 172. This case was one wherein mandamus was sought to require a commissioners court to create the office of Justice of the Peace, Place No. 2 of Justice of the Peace, Precinct One of Gregg County, Texas. I think the Court would have made the same holding had the cause been before the appellate courts on appeal.

The Court upheld the judgment of the trial court that Article V, Section 18 of the Texas Constitution "confides in the Commissioners' Court the authority to create a justice

of the peace court as here sought; that the convenience of the people is the basic purpose for designating such an additional justice court; and that the creation of such additional justice of the peace court is a discretionary act of the Commissioners' Court and not a ministerial function of such court." The Court then said:

> "We cannot escape the import of the use of the term 'for the convenience of the people' in Sec. 18, supra; 16 C.J.S., Constitutional Law, § 23. The latitude so granted the Commissioners' Court to create not less than four and not more than eight such precincts, and the power to change the boundaries of such precincts from time to time emphasizes the intent to vest discretionary powers in the Commissioners' Court in determining whether or not the creation of such additional court would be for the convenience of the people, that is suitable, appropriate or advisable to meet the needs of the people. This discretionary power on the part of the Commissioners' Court is fully recognized in Williams v. Castleman, 112 Tex. 193, 247 S.W. 263, by our Supreme Court, which involved an affirmative act of the Commissioners' Court in creating such an additional Justice Court, and in the holdings in Lewis v. Harris, Tex. Civ. App., 48 S.W. 2d 730, and Ward v. Bond, Tex. Civ. App., 10 S.W. 2d 590, 594, which dealt with the discretionary powers of a Commissioners' Court as related to the latter clause of Sec. 18, supra, in altering a Commissioners' Precinct.
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> "'Mandamus will not lie to control or review the action of an official or board upon matters involving the exercise of discretion or judgment confided to such official or board.' Lewis v. Harris, supra, 48 S.W. 2d at page 732; 28 T.J. (Mandamus), Sec. 33."

This holding in regard to discretionary power to create justice courts is equally applicable to this case where the commissioners court has exercised its discretion in changing its boundary lines.

If it can be said that the judgment of the trial court is based upon a finding of abuse of discretion and that Avery has a justiciable interest, I nevertheless maintain that the trial court confined its holding to require a redistricting of Midland County into commissioners precincts upon the basis of population alone.

Avery is in no position to individually attack or set aside the order creating Midland County commissioners precincts because of a disparity in the population of the several precincts in the absence of a showing of some damage, harm, inconvenience, or financial loss to himself personally. This he has failed to do. There being no duty to provide Avery with equally populated commissioners precincts, no legal wrong has been done to him by refusal to divide in that way; there has been no invasion of his personal rights by including him in a commissioners precinct with a population larger than the other precincts.

Avery attempts to also bring this suit in terms of a class action. In this attempt he completely fails. In his petition he states his capacity as follows:

> "Plaintiff files this petition on behalf of himself and other persons similarly situated in the City of Midland, Precinct No. 1, Midland County, Texas, and states that he is a resident, taxpayer, and legally qualified voter and elector of the City of Midland, Precinct No. 1, Midland County, Texas, and that, as such, he is legally qualified to vote for municipal, precinct and county offices in Midland County, Texas."

The right which he sought was as follows:

> "The Plaintiff has a right and interest to see that *his* civil rights and liberties and in particular *his* right and

interest in an equitable apportionment of voting power for members of the Commissioners Court are protected in accordance with the terms of the Texas Constitution and Section 1 of the 14th Amendment to the Constitution of the United States."

The pleadings in this case upon which Avery went to trial are completely void of allegations which would qualify as a class action. The petition fails to comply with any of the provisions of Rule 42,[2] Texas Rules of Civil Procedure. Only a quick glance at the rule is required to conclude that Avery does not seek to qualify under subdivision (1) of the rule, because the rights which he seeks to enforce are *his* rights and liberties and *his* right to equitable voting power. Such right is not joint or secondary and on its face could not be the proper subject of a class action under subdivision (1) of the rule. Subdivision 2 is out, because there is no specific property involved in this action. Avery's petition fails to

[2] "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, in behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it. Amended by order of September 20, 1941, effective December 31, 1941."

qualify him as representing a class, in that it fails to state that there are persons constituting a class. The petition on which he went to trial does not allege that there are other persons having a common interest with Avery in adjudication of a common question of fact or law. In fact, the record shows that public officials and many others who publicly refused to support Avery, were all citizens of Midland. The evidence and the proceedings fail to show any support of Avery's position from the City of Midland or the residents of the City as a group. The petition does not describe any identifiable class of persons nor state or show that they are so numerous as to make their joinder in the suit impracticable. There is nothing in the petition to show that there are others "similarly situated." The pleadings are lacking and Avery produced no evidence to warrant a valid class judgment. See Schenker v. City of San Antonio, Tex. Civ. App., 369 S.W. 2d 626 (wr. ref., n.r.e. 1963).

Since the subject matter of Avery's complaints in this Court is the disparity of population, and since that subject is a matter of *public* not *private* concern, and since Avery did not properly allege or prove a class action in the trial court, so as to represent the public, the result is that he never reaches or gets to the question of substantial evidence, abuse of discretion, or his asserted claims to *alternative*[3] relief.

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[3] The prayer, reflecting the relief sought, reads as follows:

"Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

"(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of

Avery has no standing in this Court to complain of the action of the Court of Civil Appeals on his substantial evidence and alternative relief claims. I would dismiss this cause for want of jurisdiction. In no event does the Constitution of the United States or the Texas Constitution require that Midland County be divided into four equally populated precincts. The Court's view, if finally adopted, will lead to great confusion and uncertainty not only in Midland County, but in every county in Texas with citizens who have a desire to substitute their judgment for that of

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their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said county into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

"(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people, giving proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

"(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially

the commissioners courts. It seems to me that this is not the proper case in which to extend the doctrine of the one man-one vote rule to the governing bodies of local governments such as commissioners courts. Perhaps, in a proper case, the federal courts will in the future take jurisdiction under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, but I cannot imagine a situation, much less the one presented in this case, where the Texas Constitution of the case law would warrant a holding that there must be equality of population in Commissioners precincts.

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the same number of people, qualified voters, square miles, and other pertinent things.

"(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election thereunder and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing so establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters."

APPENDIX "C"
OPINION OF THE COURT OF CIVIL APPEALS

CLAYTON, Justice.

This is a county commissioners' precinct redistricting case, appealed from the judgment of the District Court of Midland County, Texas. Avery, appellee here, brought the suit as a resident property owner, tax payer and qualified voter of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas, "individually and on behalf of other persons similarly situated and qualified" against the County of Midland and its county judge and four county commissioners, appellants here. Plaintiff-appellee's pleadings reflect that, since the time of its incorporation in 1901, the City of Midland, lying virtually in its entirety in Commissioners' Precinct No. 1, has been the only incorporated city, town or village in Midland County. The city's population has grown through the years until at the time of the 1960 Federal Decennial Census its population represented 92.48 per cent of the population of the county, and Precinct No. 1 contained 97.80 per cent of the population of the county. Of the qualified voters of the county in that year, 97.88 per cent resided in Precinct No. 1. Plaintiff asserted that other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of county funds and revenue, etc., were disproportionately distributed among the commissioners' precincts of the county, making the precincts as established "grossly impractical and inconvenient to the people". In September, 1962, plaintiff petitioned the Com-

missioners' Court for a redistricting of the county's precincts, but "such petition and request was refused". In that same month this suit was filed to compel a redistricting, invoking the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution, Vernon's Ann. St. During the pendency of this suit, and in July and August, 1963, public hearings were held by the Commissioners' Court on the matter of redistricting the county, during which time plaintiff and others testified or presented plans for such redistricting. On August 31, 1963, plaintiff's pleadings relate, the Commissioners' Court adopted an order, effective January 1, 1964, redistricting Midland County into commissioners' precincts, which order, plaintiff alleges, made only insignificant changes in the boundaries of commissioners' precincts and in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of county roads and other pertinent things among the commissioners' precincts of said county; that in passing said order the commissioners had acted arbitrarily and capriciously, in abuse of their discretion and without regard to the convenience of the people of Midland County or the rights, privileges and guarantees of plaintiff and others similarly situated by the Constitution of the State of Texas and of the United States. Plaintiff prayed that such order of the Commissioners' Court of August 31, 1963 and all prior orders dividing Midland County into commissioners' precincts be set aside and that writ of mandamus issue compelling the defendants to pass a new order giving

proper consideration to equality of population and the other factors said by plaintiff to be pertinent in the division of the county into commissioners' precincts.

The presiding judge, who heard the cause without the intervention of a jury, found that Precinct No. 1 had in excess of 95 per cent of the total population of the county under the order of August 31, 1963, and that on the date of such order over 97 per cent of the qualified voters of the county resided in said Precinct No. 1, and that there was a gross disparity of other pertinent factors, such as land area and taxable values in said order as in all previous orders dividing said county into commissioners' precincts; that in passing such order of August 31st the defendants had acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully, in gross abuse of their discretion, and that their action constituted invidious discrimination. The court's judgment further found that the said order was not for the convenience of the people of said county as required by Article V, § 18 of the Constitution of the State of Texas. The judgment of the court set aside said order and all previous orders dividing the county into commissioners' precincts, and ordered that the Commissioners' Court, not later than the next succeeding July or August term of said court, "divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people."

[1] Appellant Commissioners advanced twelve points of error and appellant Midland County presented two points

of error attacking the District Court's order as above set out. We deem it unnecessary to discuss these points separately or at length, but will treat only those assignments which relate to that part of the order underscored above which embodies the mandatory requirement that the county be divided into precincts so that each would have substantially the same number of people. We are in accord with the assertion by appellant Commissioners that "neither the Constitution of the United States nor the Constitution of Texas, as construed and interpreted by the courts, contains any requirement that county commissioners precincts be equal to each other in population * * *" Article IV, § 4 of the United States Constitution merely provides that "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." Amendment XIV, section 1 provides: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article V, § 8 of the Texas Constitution provides that the district courts "shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; * * *"; and § 18 of the same Article relates to commissioners' precincts:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than

> four and not more than eight. * * * Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner * * *. The County Commissioners, so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. * * *"

Among the scant authority in Texas on the subject of establishment of commissioners' precincts is to be found in the 1932 opinion of this court in Lewis v. Harris, 48 S.W. 2d 730, in which a writ of error was refused. This was a redistricting case which arose in Upton County, and we find the facts involved and the language employed so nearly applicable to the case before us as to justify quotation therefrom at some length. The court states:

> "* * * Appellants cite section 18, art. 5, of the State Constitution which, in substance, requires the division of the county 'from time to time, for the convenience of the people, into precincts,' and that the commissioners' precincts shall be four in number.
>
> "Disregarding legal conclusions stated therein, the petition here simply shows a state of facts which gives to the town of Rankin and precincts Nos. 1, 2, and 3 a power of control over the commissioners' court of the county out of proportion to their population, voting strength, and taxable values, thereby denying to the town of McCamey and precinct No. 4 the representation upon the court and power of control to which such town and precinct is justly entitled by the population, voting strength, and taxable values thereof.
>
> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution,

may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations. This is what the present action seeks to compel. The location of cities and towns in certain counties is no doubt such that it cannot be conveniently done. From a political viewpoint it is desirable and just that the precincts should be so arranged, but in some instances it is doubtless not practical.

"It is not alleged that a redivision of the county as sought is practical and convenient for the people. Plaintiffs simply base their demand upon population, voting strength, and taxable valuation. The present division is inconvenient in the sense only that the town of McCamey and precinct No. 4 have not the representation upon and control of the commissioners' court to which the plaintiffs say such town and precinct are justly entitled by the population, voting strength, and taxable valuation thereof.

"There is no law imposing upon a commissioners' Court the duty of rearranging the commissioners' precincts of a county upon such a basis, and the writ of mandamus will not lie to compel such action. The demurrers were properly sustained."

The cited case is given recognition in Hatter v. Worst, 390 S.W. 2d 293 (Tex. Civ. App., 1965; n.r.e.), although Lewis v. Harris was not controlling on the issue involved in the latter case. An analytical and well-documented discussion of the case now before us is to be found in the Winter, 1965 issue of the Baylor Law Review, Vol. XVII, No. 1, p. 41, written by J. William Davis, which it would be well

for the reader of this opinion to review for additional background information on the case before us.

[2, 3] We have come to the conclusion that the judgment of the lower court in the instant case must be reversed. It has been stated here that this judgment orders the Commissioners' Court of Midland County to divide said county into four Commissioners' Precincts "for the convenience of the people of said County" and in so doing to establish such commissioners' precincts "so that each will have substantially the same number of people". The order thus exceeds the admonition contained in the Texas Constitution that requires only that the division of the county in such precincts be "for the convenience of the people", which, as stated in Lewis v. Harris, supra, cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths and taxable valuations, however desirable, in certain instances, such a division might be. Just as there is no law or constitutional requirement that such a division be made, neither is there authority, in our opinion, for the lower court herein to compel the establishment of commissioners' precincts so that each will have substantially the same number of people. Following this reasoning, the lower court was without authority to enter the order embodied in its judgment, and such judgment must therefore be reversed.

Since this case has been thoroughly tried and expertly briefed by both parties, we feel that no useful purpose would be served by a remand, and this cause is therefore here rendered for the appellants.

Reversed and rendered.

APPENDIX "D"

CONSTITUTION OF STATE OF TEXAS

Art. 5 Sec. 8. Jurisdiction of District Court

Sec. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander of defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general

control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. As amended Aug. 11, 1891; proclamation Sept. 22, 1891.

Art. 5, Sec. 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold

his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

APPENDIX "E"

ACTS OF THE TEXAS LEGISLATURE

Art. 1908. Over commissioners courts

Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law. Id.

Art. 2.04. County election precincts formed by commissioners court

(a) Each county shall be divided into convenient election precincts by the Commissioners Court of the county, each of which precincts shall be differently numbered and described by natural or artificial boundaries or survey lines by an order entered upon the minutes of the Court. At any July or August term, the Court may make such changes in the election precincts as they deem proper, by such order entered upon the minutes of the Court. When such an order is entered, they shall immediately thereafter publish in some newspaper in the county for three consecutive weeks a notice of the entry of such order, giving a brief description in general terms of the changes made, giving a brief description in general terms of the changes made, without the necessity of including in such notice the field notes or other detailed description of the precinct boundaries. If there be no newspaper in the county, then a copy of such order shall be posted in some public place in each election precinct in the county which is affected by the order.

(b) No election precinct shall be formed out of two or more justice precincts or commissioners precincts, nor out of the parts of two or more justice precincts or commissioners precincts; and no election precinct shall be formed out of two or more Congressional Districts or State Senatorial Districts or State Representative Districts, nor out of the parts of two or more such Districts. If in September of any year there exists any election precinct in the county which does not comply with the foregoing requirements, the Commissioners Court shall make the necessary changes before the first day of October, either at a regular meeting or at a special meeting called for that purpose; and the order shall be published as provided in Paragraph (a) of this Section. No election precinct shall have resident therein more than two thousand voters as ascertained by the current certified lists of qualified voters; provided, however, that in precincts in which voting machines have been adopted for use, the maximum number of voters shall be three thousand.

(c) In cities and towns having ten thousand or more inhabitants, each ward shall constitute an election precinct unless there shall reside in said ward more than two thousand qualified voters. In such cities and towns, no precinct shall be made out of parts of two wards; and no precinct shall include territory outside the corporate limits of the city or town unless the Commissioners Court finds that adjacent unincorporated territory is so situated that it cannot be formed into or included within an election precinct wholly outside the city, of suitable size and shape and

containing a suitable number of voters. If the Commissioners Court finds this condition to exist, it may include such territory in a precint or precincts formed within the city or town, and the finding of the Commissioners Court shall be conclusive.

(d) In cities, towns and villages of less than ten thousand inhabitants, election precincts may be formed without regard to the wards or the corporate limits of the city, town or village.

(e) Changes in election precincts shall not become operative in the holding of elections until the beginning of the following voting year. The Commissioners Court shall cause to be made out and delivered to the County Tax Collector before the first day of each September, a certified copy of such last order for the year following; provided, however, that any order entered during the month of September, as provided in Paragraph (b) of this Section, shall be delivered to the Tax Collector forthwith. Acts 1963, 58th Leg., p. 1017, ch. 424, Sec. 7; Acts 1965, 59th Leg., p. 1552, ch. 678, Sec. 1, emerg. eff. June 18, 1965.

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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1965

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 958

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The petition for a writ of certiorari in this case seeks review of a judgment of the Texas Supreme Court (406 S.W. 2d 422) upholding the districting scheme pursuant to which members of the county governing board of Midland County, Texas, are elected. Under this scheme three of the four Midland County commissioners are elected by only five percent of the county's population, while the other 95 percent elect only one commissioner. Reviewing a challenge invoking the Equal Protection Clause of the Fourteenth Amendment, the Texas Supreme Court concluded that the principles stated by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, and related cases are not applicable to county governing boards and do not

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require redistricting of Midland County on a population basis. The petition for certiorari was filed on January 10, 1967, and briefs in opposition in early February.

On December 5, 1966, this Court noted probable jurisdiction in three cases[1] involving principally the applicability of the principles stated in *Reynolds* to units of local government. Three-judge courts were convened in each of these cases, and direct appeals were taken to this court. Subsequently, on January 9, 1967, the Court set a similar case[2] for argument with the other three cases, postponing a determination as to jurisdiction to the hearing on the merits, and directing the parties to brief and argue the question of whether a three-judge court should have been convened. A three-judge court was not convened in that case, and the apeal was from a decision of the Fourth Circuit.

It is the intention of the United States to file an *amicus* brief in all four of these cases. Jurisdictional problems aside, the government will support appellants in Nos. 430 and 624, and appellees in Nos. 491 and 724. The interest of the United States in these cases is that of millions of American citizens who are presently denied, through malapportionment at the local level, full and effective participation in the processes of the various units of local government. It is the position of the United

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[1] *Sailors* v. *Board of Education of Kent County*, No. 430; *Board of Supervisors of Suffolk County* v. *Bianchi*, No. 491; and *Moody* v. *Flowers*, No. 624, all this Term.

[2] *Dusch* v. *Davis*, No. 724, this Term.

States that, as a matter of constitutional principle, logic and sound policy, the principles of *Reynolds* apply to local governmental bodies whose members are elected from districts and require that those districts be substantially equal in population.

We assume that the instant case, involving issues basically similar to those involved in the four cases soon to be argued (and, more specifically, similar to those in Nos. 491 and 624 which, like this case, involve county governing boards), would in normal course be held by the Court pending argument and decision in the other cases. In the course of preparing our brief in the latter cases, however, it has come to our attention that serious jurisdictional problems may exist with respect to two of the four cases set for argument, and specifically as to Nos. 491 and 624, both of which are most closely related to the instant case. It is in light of this consideration that this memorandum is filed, although we intend to discuss the jurisdictional question more fully in our brief.

In our view it is quite doubtful that three-judge statutory courts were properly convened in Nos. 491 and 624. This Court has consistently construed 28 U.S.C. 2281 as authorizing the convening of a three-judge court only when a State statute of general, statewide application is challenged and sought to be enjoined. *E.g., Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U.S. 208, 212–213; *Phillips* v. *United States,* 312 U.S. 246, 248–254; *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 227–228. Under these and like precedents, where only a local ordinance or a

State statute of limited application is sought to be enjoined, convening of a three-judge court is improper. In No. 491, the constitutional attack was directed toward the Suffolk County Charter.[3] Somewhat inexplicably, the three-judge court in that case discussed the jurisdictional question, but never articulated its resolution thereof, simply continuing to sit as a statutory court (see 238 F. Supp. 997, 999, 1001–1004). In No. 624, a State statute[4] prescribed the scheme for electing members of the county board, and State officials were named as defendants. Nevertheless, the statute at issue related solely to Houston County, Alabama, and could not therefore be properly viewed as a statute having statewide application.

Conversely, in No. 430 a three-judge court was properly convened, in our view, since the statute at issue was one relating generally to all Michigan county school boards of a certain type, and thus was a statute of general and statewide application. In No. 724, a single district judge properly heard and determined the case, in our view, since only a city charter provision (enacted as a State statute of limited appli-

[3] Sections 201 and 203 of the Suffolk County Charter, Laws of New York, 1958, Ch. 278, which are set out in Appendix F of the Jurisdictional Statement in No. 491, pp. 51a–52a. Although the county charter was enacted into law by the State legislature, such enactment could hardly be properly regarded as a State statute of general application.

[4] Acts of Alabama, Reg. Sess., 1957, No. 9, p. 30, which is set out in Appendix C of the Jurisdictional Statement in No. 624, pp. 30–36. The litigation below also involved the apportionment of another Alabama county, under a similar statute of limited application (see 256 F. Supp. 195, 198).

cation) was involved,[5] and appeal to the court of appeals was proper. In similar circumstances, a number of lower federal courts have concluded, in other cases challenging malapportionment at the local level, that three-judge courts should not be convened. See, *e.g.*, *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), affirmed, 352 F. 2d 123, 124, n. 1 (C.A. 4); *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 31 (W.D. Pa.); *Strickland* v. *Burns*, 256 F. Supp. 824, 825, n. 1 (M.D. Tenn.); *Johnson v. Genessee County, Michigan*, 232 F. Supp. 563, 564–566 (E.D. Mich.); *McMillan* v. *Wagner*, 239 F. Supp. 32, 33–34 (S.D.N.Y.).[6]

If we are correct in perceiving jurisdictional problems in Nos. 491 and 624, the Court might not be able to reach the merits in those cases, since jurisdiction upon direct appeal under 28 U.S.C. 1253 exists only if the case was one "required" to be heard by three judges. We assume that the Court undertook to review a number of these cases together so as to have before it a variety of situations involving different sorts of local governmental bodies. Should the Court be unable to reach the merits in Nos. 491 and 624, there would no longer be before it for decision upon plenary consideration a case involving a

[5] See Circuit Judge Bryan's opinion in support of the dissolution of the three-judge court initially convened in No. 724, which is set out in the Appendix to the Jurisdictional Statement in that case (App. 25–28).

[6] Compare, however, *Simon* v. *Lafayette Parish Police Jury*, 226 F. Supp. 301, reversed and remanded for convening of a three-judge court *sub. nom. Simon* v. *Landry*, 359 F. 2d 67 (C.A. 5), certiorari denied, 385 U.S. 838.

county governing board—one of the most basic and common units of local government and the body as to which much of the lower federal and State court litigation on the constitutional issues has related. This, in our view, would be unfortunate.[7]

In light of these considerations, we suggest that the Court may wish to grant certiorari in the instant case and set it for argument along with the other cases.[8] Should it then be determined, after oral argument, that jurisdiction is lacking on direct appeal in Nos. 491 and 624, the Court would still have before it for decision on the merits one case involving a county governing board.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1967.

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[7] Both Nos. 430 and 724, the cases as to which this Court's jurisdiction on appeal seems clearly proper, involve somewhat unique and specialized questions, because of the nature of the process pursuant to which the county school board is elected in No. 430 and since an at-large election of the city council in No. 724 is provided for, but with seven of the eleven councilmen being required to reside in districts grossly disproportionate in population. Although the government will contend that the *Reynolds* principles should nevertheless be found applicable to these situations, because of these features neither No. 430 nor No. 724 presents the most appropriate vehicle, in our view, for a broad-based consideration and determination of the important constitutional questions involved.

[8] It appears that this Court's certiorari jurisdiction is properly invoked under 28 U.S.C. 1257(3) in the instant case. Should the Court grant certiorari in the instant case, the government intends to participate as *amicus* in that case as well.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 39

HANK AVERY, Petitioner,
against
MIDLAND COUNTY, TEXAS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, et al., Appellants,
against
I. WILLIAM BIANCHI, JR., et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 430

JAMES SAILORS, et al., Appellants,
against
BOARD OF EDUCATION OF THE COUNTY OF KENT, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF MICHIGAN

No. 624

EARLE C. MOODY, et al., Appellants,
against
RICHMOND M. FLOWERS, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF ALABAMA

No. 724

FRANK A. DUSCH, et al., Appellants,
against
J. E. CLAYTON DAVIS, et al., Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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ON APPEAL FROM THE COURT OF APPEALS OF THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of the *Amicus*

The Attorney General of the State of New York is vitally interested in the above appeals insofar as their dis-

position may affect the future structure of municipal and county government.

Numerous suits have been instituted in the courts of our State to compel the reorganization of county boards and other local legislative bodies in accordance with the principle set forth in *Reynolds* v. *Sims*, 377 U. S. 533 (1964). The New York State Office For Local Government reports that a total of 25 counties of the 62 counties in the State have been involved in such litigation. City legislative bodies have been involved in similar litigation to a lesser degree.

The most recent bulletin of our Office For Local Government (Feb. 28, 1967) also indicates that, in the November, 1966 general elections alone, reapportionment plans were considered by referendum in 17 counties. At such elections, twelve plans were approved, five disapproved. As to the latter five counties, action is now being taken to formulate new plans. The local government report states, too, that 13 counties are currently operating with reapportioned legislative bodies including three which have adopted weighted voting plans in November, 1966 and nine in which interim weighted voting has been imposed by court order.

We need not burden the Court with further statistics to demonstrate the need to restore order to local government in New York, as well as other States; and to remove any doubt as to whether, *and to what extent*, this Court intends the principles stated in *Reynolds* to be applicable to county boards and other forms of local government.

The Attorney General of the State of New York, accordingly, files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

Position of the New York Attorney General

(1)

We are informed that the United States Solicitor General, through an *amicus* memorandum filed (March, 1967) in *Avery* v. *Midland County, Texas* (No. 958, Oct. Term, 1966), is expressing doubt that a three-judge statutory court was properly convened in *Board of Supervisors of Suffolk County* v. *Bianchi* (No. 491).

The Attorney General has abstained from active participation in earlier stages of the Suffolk County litigation (No. 491) since it has not concerned the constitutionality of any statute which has state-wide application. That action deals with a provision of the Suffolk County Charter (§ 203), in effect only in a single county of the State.

It further appears from the memorandum for the United States as *amicus curiae* that it is quite doubtful that a three-judge statutory Court was properly convened in No. 624. Since, as we have indicated (*supra*), the New York courts have encountered voluminous litigation involving the question of whether and to what extent county governing boards are to be controlled by this Court's ruling in *Reynolds* v. *Sims, supra,* and related cases, we support the suggestion of the United States Solicitor General (p. 6) that the Court may wish to grant certiorari in the Texas case (No. 958) and set it for argument along with the other cases to determine these questions at this time.

(2)

The New York Court of Appeals has already held that the principle stated in *Reynolds* v. *Sims, supra,* is applicable to local legislative bodies. *Seaman* v. *Fedourich,* 16 N. Y. 2d 94, 101 (1965). It has further held that the courts of New York "obligated as they are to uphold the Federal Constitution as well as the State's Constitution—whose equal protection clause * * * is as broad in its cover-

age as that of the Fourteenth Amendment * * * are vested with jurisdiction of actions brought to vindicate the right to equal representation" (16 N. Y. 2d 94, 102).

In view of the holding in the *Seaman* case, which has been consistently followed by the lower courts in New York, the Attorney General advocates in an appropriate case in this Court (the U. S. Solicitor General suggests No. 958), the extension of the "one person, one vote" principle to local legislative bodies. It has already been so extended in numerous New York cases. See, for example, *Goldstein* v. *Rockefeller*, 45 Misc. 778 (S. Ct., Monroe Co., 1965), where this office urged (pp. 782-783) such extension of the *Reynolds* principle. See also *Town of Greenburgh* v. *Bd. of Supervisors of Westchester County*, 49 Misc. 2d 116 (Sup. Ct., West. Co., 1966), 51 Misc. 2d 168 (1966); and 53 Misc. 2d 88 (reported with deletions, 157 New York Law Journal, No. 29, p. 18, Feb. 10, 1967) where former Presiding Justice NOLAN approved, in principle, reapportionment plans providing for both weighted voting and multi-member districts, as methods of effectuating the "one person, one vote" principle.

(3)

We urge, however, that this Court, in extending the principle of "one person, one vote" to local legislative bodies, permit adequate variety in the manner in which local governments may comply with this principle. The New York rule set forth in the *Seaman* case (*supra*) does not preclude local governments in New York, which have been granted a considerable degree of "home rule" power* from adopting many forms of local government, including those which provide for modified weighted voting, to achieve compliance with the principles of the *Reynolds* case. Even one of the most enthusiastic advocates of this Court's decision in *Reynolds* has recognized that this Court

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*See New York Constitution, Art. IX, § 8; and New York Municipal Home Rule Law (McKinney's Cons. Laws of New York, Book 35-C).

has "reserved to the states the traditional room for experimentation and maneuver". McKay, *Reapportionment* (1965), p. 254.

The leeway required for variety in providing fair representation of voters in local governmental affairs was recognized by the three-judge Court convened in *Blaikie* v. *Wagner*, 258 F. Supp. 364 (D.C.N.Y., 1965). That Court held that the *Reynolds* principle did not prevent a city-wide limited voting system designed to afford representation to a minority party in each county of the city. More recently, this need for variety was recognized in the latest opinion in the Westchester County case.* See also, Dixon,

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* In recognizing the need for an element of discretion in the manner in which county governments shall conform to the principle of "one person, one vote", Justice NOLAN stated (157 N.Y.L.J., *supra*, p. 18):

> "Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (cf. *Reynolds* v. *Sims*, *supra*, 377 U. S. 533, 578; *Swann* v. *Adams*, *supra*). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county board of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. The composition of boards of supervisors has been provided for by state laws presumably for reasons which the Legislature considered sufficient, and while those laws may be superseded under home rule powers, or charter provisions there is no reason why a board of supervisors should not attempt to comply with them in so far as it may be possible to do so if that purpose can be effected without violation of the constitutional rights of the citizens of the country. The towns and the cities are political subdivisions of the county, and large or small, each has its problems which it does not share with neighboring towns, or cities, and in which its neighbors may have no interest whatsoever."

Reapportionment Memorandum on Floterial Districting, Population Variances Among States, And Additional Elements of Fair Representation (Dec. 5, 1966), pp. 31-34.

Dated: New York, New York, March 15, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

SEP 20 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1967

No. 39

HANK AVERY,

Petitioner,

against

MIDLAND COUNTY, TEXAS, et al.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

The Attorney General of the State of New York, by reason of his vital interest in the subject of county government structure and because of the volume of reapportionment litigation which has developed in our State, supported the suggestion of United States Solicitor General that this Court might wish to grant certiorari in this case (See our brief, dated March 15, 1967 in this case; October Term 1966, No. 958). Certiorari was granted June 12, 1967.

(1)

The New York Court of Appeals has already held that the principle stated in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), is applicable to local legislative bodies. *Seaman* v. *Fedourich*, 16 N. Y. 2d 94, 101 (1965). It has further held that the courts of New York "obligated as they are to uphold the Federal Constitution as well as the State's Con-

stitution—whose equal protection clause * * * is as broad in its coverage as that of the Fourteenth Amendment * * * are vested with jurisdiction of actions brought to vindicate the right to equal representation" (16 N. Y. 2d 94, 102).

In view of the holding in the *Seaman* case, which was followed in *Iannucci* v. *Board of Supervisors of County of Washington*, 20 N. Y. 2d 44 (July 7, 1967), and has been consistently followed by the lower courts in New York, the Attorney General advocates the extension of the "one person, one vote" principle to local legislative bodies. It has already been so extended in numerous New York cases. See, for example, *Goldstein* v. *Rockefeller*, 45 Misc. 778 (S. Ct., Monroe Co., 1965), where this office urged (pp. 782-783) such extension of the *Reynolds* principle.

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We urge, however, that this Court, in extending the principle of "one person, one vote" to local legislative bodies permit adequate variety in the manner in which local governments may comply with this principle. The New York rule set forth in the *Seaman* case (*supra*) does not preclude local governments in New York, which have been granted a considerable degree of "home rule" power* from adopting many forms of local government, including those which provide for modified weighted voting, to achieve compliance with the principles of the *Reynolds* case. Even one of the most enthusiastic advocates of this Court's decision in *Reynolds* has recognized that this Court has "reserved to the states the traditional room for experimentation and maneuver". McKay,

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* See New York Constitution, Art. IX, §§ 1-3; and New York Municipal Home Rule Law (McKinney's Cons. Laws of New York, Book 35-C). The proposals of the current New York State Constitutional Convention relating to local reapportionment may prove to be more restrictive (See New York Times, Vol. CXVI, No. 40,038, Thursday, September 7, 1967, pp. 1, 21).

Reapportionment (1965, p. 254). See also, Dixon, *Reapportionment Memorandum on Floterial Districting, Population Variance Among States, And Additional Elements of Fair Representation''* (Dec. 5, 1966, pp. 31-34).

The leeway required for variety in providing fair representation of voters in local governmental affairs was recognized by the three-judge Court convened in *Blaikie* v. *Wagner,* 258 F. Supp. 364 (D.C.N.Y., 1965). That Court held that the *Reynolds* principle did not prevent a citywide limited voting system designed to afford representation to a minority party in each county of the city.

More recently, this need for variety was recognized in *Town of Greenburgh* v. *Bd. of Supervisors of Westchester County,* 49 Misc. 2d 116 (Sup. Ct., West. Co., 1966), 51 Misc. 2d 168 (1966); and 53 Misc. 2d 88 (1967), where former Presiding Justice NOLAN approved, in principle, a reapportionment plan providing for both weighted voting and multi-member districts, as a method of effectuating the ''one person, one vote'' principle.

In recognizing the need for an element of discretion in the manner in which county governments shall conform to the principle of ''one person, one vote'', Justice NOLAN stated (53 Misc. 2d 88, 103):

> ''Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to State legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (*cf. Reynolds* v. *Sims, supra,* 377 U. S. 533, 578; *Swann* v. *Adams, supra*). The equal protection clauses do not require the application of rigid rules in all cases of

legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between State legislative bodies and county boards of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. The composition of boards of supervisors has been provided for by state laws presumably for reasons which the Legislature considered sufficient, and while those laws may be superseded under home rule powers, or charter provisions, there is no reason why a Board of Supervisors should not attempt to comply with them insofar as it may be possible to do so if that purpose can be effected without violation of the constitutional rights of the citizens of county. The towns and cities are political subdivisions of the county, and large or small, each has its problems which it does not share with neighboring towns, or cities, and in which its neighbors may have no interest whatsoever."

See also the most recent decision in the *Westchester* case, by Mr. Justice DILLON on August 23, 1967 where he found that the constitutionality of the mathematical structure of the Westchester County plan had been established by competent and reliable proof, based on computer analyses (Appendix A, annexed hereto, since it is not yet officially reported).

(3)

This Court's recent decision in *Sailors* v. *Board of Education of the County of Kent,* 387 U. S. 105 (1967), has been interpreted by Chief Judge FULD of our Court of Appeals as holding that "all of the constitutional principles which govern the apportionment of state legislatures are not necessarily applicable to the organization of local governments". *Iannucci* v. *Bd. of Supervisors*

(*supra*). The Chief Judge cited (20 N. Y. 2d 244, 250) the portion of Mr. Justice DOUGLAS' opinion in *Sailors* which stated (387 U. S., at pp. 110-111):

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

In the same case, Chief Judge FULD viewed this Court's decision in *Dusch* v. *Davis*, 387 U. S. 112 (1967), as an approval of Virginia Beach's "experimentation" in local government and as reflecting "a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis" (20 N. Y. 2d, at pp. 250-251). As a supplemental authority for this proposition, Chief Judge FULD called attention (20 N. Y. 2d, at p. 251) to the decision in *Matter of Blaikie* v. *Power*, 13 N. Y. 2d 134, app. dism. 375 U. S. 439, sustaining the New York City measure to secure greater minority party representation in its City Council by assuring the election of at least five councilmen-at-large from parties other than the majority party in each of the City's five boroughs.* The dissent by Judge BREITEL in the *Iannucci* case regarded the *Sailors* and *Dusch* cases (*supra*) as recognizing that the "one man-one vote doctrine should not be applied with the same precision to local elective bodies as to State legislatures" and as pre-

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* After this Court vacated the three-judge District Court judgment in *Board of Supervisors of Suffolk County* v. *Bianchi*, 387 U. S. 97 (1967), the District Court (BRUCHHAUSEN, J., June 27, 1967), upon remand, dismissed the complaint therein for failure to state a cause of action, upon the ground that "population disparity, without other factors, does not render a local system unconstitutional". The Court of Appeals for the Second Circuit has not yet passed upon Judge Bruchhausen's disposition of the *Suffolk* case (Docket No. 31652, appeal docketed August 30, 1967). We are informed however, that the plaintiffs have also petitioned this Court for certiorari (No. 591, October Term, 1967).

venting any conclusion that weighted voting plans are "generically invalid" (20 N. Y. 2d 244, at p. 255).

Another recent New York case merits the Court's attention. In *Shanker* v. *Regents of Univ., N. Y.*, 27 A. D. 2d 84 (3rd Dept., 1966), aff'd 19 N. Y. 2d 951, upon the Appellate Division opinion (May 31, 1967), it was held that the election of members of the Board of Regents by the New York State Legislature did not violate the one man-one vote rule. New York Education Law, § 202, provides that the Board shall be composed of 15 members elected by the Legislature, one of whom shall be chosen from each of the 11 State's Judicial Districts, with 4 chosen at large (27 A. D. 2d, at p. 85). There was no question but that the populations of the Judicial Districts were disproportionate. Although it was assumed that the Board of Regents exercised "a legislative function", within the educational system because it possessed "rule-making powers", it was ruled that the Board had been created as "an administrative board" (27 A. D. 2d, at p. 86). The Appellate Division held that no constitutional right of the plaintiff was violated since the Board of Regents was not "a general elective organ" and the members of the Board were not "the elected representatives" of the plaintiff (27 A. D. 2d, at pp. 86, 87). The Court of Appeals (19 N. Y. 2d 951, 952), in affirming upon the opinion of the Appellate Division, cited as additional authority this Court's decision in *Sailors* (*supra*).*

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* The case at bar is distinguishable from the *Shanker* case. In Texas, the four precinct commissioners of the "Commissioner's Court" are elected *by the voters* of the precinct and their presiding officer, the county judge, is elected *by the voters* of the entire county.

A question is presented, however, as to the nature of the function of the Commissioners, whose primary function was regarded by the Supreme Court of Texas as administrative, rather than legislative (R. p. 145). Analysis of the nature of the functions of the Texas commissioners we leave to the Texas litigants and to the United States Solicitor General, who has informed us that he will deal with this subject.

CONCLUSION

Upon the assumption that the functions performed by the County Commissioners are determined to be substantially legislative, the one-man, one vote rule announced in *Reynolds* should apply. In that event, the judgment under review should be reversed.

Dated: New York, New York, September 13, 1967.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

Index No. 6859—1965

THE TOWN OF GREENBURGH, *et al.*,

Plaintiffs,

and

THE TOWN OF YORKTOWN, *et al.*,

Plaintiffs-Intervenors,

against

THE BOARD OF SUPERVISORS OF WESTCHESTER COUNTY, *et al.*,

Defendants.

DILLON, J.

This action for a declaratory judgment is now before the Special Term for the fourth time. It involves the problem of the reapportionment of seats and voting powers on the Board of Supervisors of Westchester County in accordance with the pronouncements of the United States Supreme Court in Gray v. Sanders, 372 U. S. 363, Reynolds v. Sims, 377 U. S. 533, and kindred cases. All previous proceedings in this matter have been before Mr. Justice Nolan, and the present application would undoubtedly have been referred to the same authority, by universal consent, except for his present assignment to the Appellate Division.

The three previous decisions have been to the following effect: On January 6, 1966, summary judgment was granted in favor of the plaintiffs declaring that the then-

existing apportionment of the Board was in violation of the equal protection clauses of the Federal and State Constitutions (49 Misc. 2d 116). In order to give the Board of Supervisors an opportunity to adopt a new and valid plan of apportionment, the court retained jurisdiction of the action for all purposes and granted leave to any party to apply at the foot of the judgment for appropriate relief. On July 6, 1966, the court disapproved a reapportionment plan adopted by the Board of Supervisors which established a 54-member board, and gave fractional voting rights to some municipalities and multiple voting rights to others, on the ground that the apportionment of voting power was not adequately related to the population base (51 Misc. 2d 168). The court directed, as a temporary measure, the use of a system of weighted voting, and remitted the matter to the Board for further consideration, again retaining jurisdiction for all purposes. On February 3, 1967, in a third decision, the court declined to give its approval to a new plan based on a method of apportionment described as "modified weighted voting," solely because the 204 votes allocated to the twelve representatives from Yonkers and the 76 votes allocated to the four representatives from New Rochelle had been divided equally without regard to the population of the individual city wards from which those representatives were to come (53 Misc. 2d 88). Under this plan a 54-member board would have cast a total of 861 votes, with each vote representing approximately 1,000 of population. Once again the court retained jurisdiction to await the further action of the Board of Supervisors.

Such further action has now been taken. With the aid of the Federal Bureau of the Census the ward populations of the cities of Yonkers and New Rochelle have been ascertained, with what would appear to be as much accuracy as can reasonably be expected, and the weighted votes of each supervisor in those two communities have

been allocated in accordance with ward populations. In the plan last considered by Mr. Justice Nolan, each Yonkers supervisor was to have 17 votes and each New Rochelle supervisor was to have 19 votes. In the proposed redistribution, based on ward populations, the weighted vote of the Yonkers representatives will vary from 15 to 21, while in New Rochelle there will be a variation of from 17 to 21. The total of 76 weighted votes allocated to the four representatives from New Rochelle remains unchanged. The total of 204 weighted votes allocated to the twelve representatives from Yonkers has been reduced to 202. The result of the 2-vote reduction in the voting strength of Yonkers has caused a reduction in the total voting strength of the Board from 861 (in the plan last presented to Mr. Justice Nolan) to 859. All these figures, and the evidence upon which they are predicated, are included in a report of the Board's Committee on Legislation which is submitted with the notice of Motion as Exhibit "I". A local law adopting the proposal as an amendment to the Westchester County Administrative Code was enacted by the Board on June 19, 1967, and was subsequently passed over the County Executive's veto on June 26, 1967.

The Board of Supervisors, one of the original defendants in the action, now moves for approval. The Town of Greenburgh, the original plaintiff, joins in the motion. The opposition comes mainly from the League of Women Voters whose representatives were permitted to intervene as parties plaintiff by an order made on October 24, 1966. The City of Mount Vernon has submitted a brief which seems to express disapproval. All the remaining political subdivisions of the County appear to be satisfied with the present plan, but of course the question of the constitutionality of the local law must be resolved without regard to the number of those who favor or oppose it. The only question before the court is whether this plan of apportionment complies with the equal protection clauses

of the Federal and New York State Constitutions, as interpreted by controlling decisions. The court may not be concerned with the merits of this plan as opposed to others, provided that it violates no constitutional mandate. The acceptability of this method of apportionment, if valid under the fundamental law, is a legislative question and must be submitted to popular referendum.

The three previous decisions made in this case (and especially the last) have served to narrow the issues to a very large extent. The conclusions reached in those decisions are the law of this case, and as such they are binding on the Special Term though not on courts of appellate jurisdiction. The following propositions must be deemed to be established, at least for the purposes of this application:

(1) That a system of weighted voting is not *per se* objectionable. This subject was discussed at length in the opinion of February 3, 1967, and the conclusion was reached that such a system of voting is valid provided it results in "effective legislative influence proportional to population." Very recently the Court of Appeals seems to have reached the same conclusion in Iannucci v. Board of Supervisors of County of Washington, 20 N Y 2d 44, July 7, 1967. There the Appellate Division, Third Department, had squarely held (27 A D 2d 346) that weighted voting was unconstitutional and that only a system of district representation based on population would satisfy the "one person-one vote" mandate of Reynolds v. Sims, *supra*. The Court of Appeals did not adopt this extreme view. It modified the Appellate Division order by remitting the matter to the Board of Supervisors with instructions to adopt a constitutionally valid plan of reapportionment; but it did so only on the ground that there was insufficient proof in the record to show that the weighted voting plan before the court gave every legislator the possibility, in

proportion to the population of his district, of casting a decisive vote. The fact that the majority did not hold that weighted voting in itself was unconstitutional was plainly spelled out in the dissenting opinion of Judge Breitel.

(2) That the plan presented to the court on the last application was, in general, an acceptable one and would have been approved except for the error of failing to apportion the votes of the Yonkers and New Rochelle legislators on the basis of ward population. No other conclusion can be drawn from the following language (53 Misc. 2d 88, at p. 99):

> "Weighted voting will or will not produce effective legislative influence, proportional to population according to the circumstances which may exist, in any given case, and the plan provided by the local law, if otherwise acceptable would, in the instant case, produce that result."

It was thus established, at least as the law of this case, that the Board of Supervisors had proposed a plan calculated in general to give effective voting power to all constituencies within the county.

(3) That the method of proof employed by the Board of submitting mathematical computations, made with the assistance of electronic computers, showing the relationship between each legislator's share of the total vote cast and the proportionate effectiveness of his vote in influencing legislation furnishes an acceptable basis for determining the validity of the plan. This may require some explanation. In any system of weighted voting it is not enough simply to allocate votes in proportion to district populations. If we assume, for example, an area of five districts, in which 60 per cent of the population resides in one district and 10 per cent resides in each of the other four, it

would be illusory to give 6 votes to the representatives of the large district and 1 vote each to the others. In such a case the four legislators from the small districts could never prevail against the one man with a majority of all the votes, and the constituents of those four legislators would be in practical effect unrepresented. To determine the validity of a weighted voting plan the process must not end with the simply ascertaining that each legislator has a number of votes proportionate to his share of the population. A further inquiry must be made to determine whether each legislator has voting rights which will enable him to influence legislation, at least in proportion to the size of his constituency. This can be done mathematically by determining, after considering every possible voting combination, each legislator's theoretical chance of casting a decisive vote. A mathematical table, showing the results of such computations, was accepted by Mr. Justice Nolan and made a part of his decision of February 3, 1967 (53 Misc. 2d 88, at p. 108). Of course the number of possible voting combinations on a 54-member board is astronomical, but it can be ascertained with the use of computers, as has been done here. Computer analyses were not only approved but mandated by the Court of Appeals in the Iannucci case, *supra*. In any event, this method of determining the *effective* vote of any legislator—that is, the possibility that his vote can actually influence legislation—has already been sanctioned by the court in this case.

(4) That a modified weighted voting plan which preserves the effective voting power of each representative should not be rejected because of mathematical calculations based upon unrealistic hypotheses and leading to the conclusion of inequality in citizen influence upon elected representatives. This argument is based upon Mr. Banzhaf's article in the Yale Law Journal on "Multi-Member Electoral Districts" (Vol. 75, No. 8, July, 1966,

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v.

MIDLAND COUNTY, TEXAS, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR PETITIONER

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(4) That a modified weighted voting plan which preserves the effective voting power of each representative should not be rejected because of mathematical calculations based upon unrealistic hypotheses and leading to the conclusion of inequality in citizen influence upon elected representatives. This argument is based upon Mr. Banzhaf's article in the Yale Law Journal on "Multi-Member Electoral Districts" (Vol. 75, No. 8, July, 1966,

p. 1309). In that interesting but somewhat abstruse article the author demonstrates mathematically that the ability of constituents to affect the outcome of legislation through their representatives varies inversely as the square root of the population; and arrives at the conclusion that in any system including multi-member districts or in any system of weighted voting deviations in the degree of citizen influence will alway result. All of this reasoning is based upon the assumption that "each legislator would in effect poll his district on each issue and cast his vote according to the majority vote." This assumption ignores all the realities of representative government, and the conclusion reached can be no more reliable than the premise from which it starts. In any event, it is enough to say at this point that Mr. Justice Nolan discussed this question at length in his last decision, and concluded that nothing more should be required than a showing that "no citizen will be denied full and effective population-based representation through his elected representative or representatives" (53 Misc. 2d 88, at p. 104).

Upon the present application all four of the foregoing propositions must be regarded as established. They are not subject to reconsideration at Special Term. Of course, the situation might be otherwise if controlling decisions to the contrary had been made subsequent to any of the earlier determinations in this case. But the court knows of none. *Kilgerlin* v. *Hill*, 386 U. S. 120, which was decided within a matter of days after the last decision in this case, holds nothing to the contrary. The court in that case did no more than say that the plan of reapportionment there proposed was invalid because of significant inequalities in the population of the various districts involved. Nor does the court find anything in the recent ruling of the Court of Appeals in Iannucci v. Board of Supervisors of County of Washington, *supra*, which requires a modification of the

conclusions previously reached in this case. In the series of cases decided by the United States Supreme Court on May 22, 1967, (Moody v. Flowers, 387 U. S. 97, 18 L. Ed. 2d 643; Board of Supervisors of Suffolk County v. Bianchi, 387 U. S. 97, 18 L. Ed. 2d 643; Sailors v. Board of Education of County of Kent, 387 U. S. 105, 18 L. Ed. 2d 650; Dusch v. Davis, 387 U. S. 112, 18 L. Ed. 2d 656) there is nothing requiring a revision of any of the principles already established here.

What the court must now do, therefore, is determine whether the Board has adequately demonstrated the validity of the present plan in the light of the earlier rulings. It seems to have been determined in the *Iannucci* case that the burden of proof is upon the proponents of the reapportionment plan, and the court there said that "the only issue calling for resolution is the factual one pertaining to the mathematical structure of the plan." Several objections have been raised by those who oppose the motion.

The first is that the enumeration of the ward populations in Yonkers and New Rochelle was not established by competent or reliable evidence. The proof of what was done appears in the report of the Board's Committee on Legislation, which is annexed to the notice of motion and which was received in evidence as Exhibit I. The court entertains no serious doubt as to the competence of that evidence. As to its reliability, the great bulk of the information was received from the Federal Bureau of the Census, which is the proper method of approach (Seamen v. Fedourich, 16 N Y 2d 94). In a few instances, where enumeration districts cut across ward lines, supplementary information was obtained as described in the Committee's report. The court is of the opinion that the final results were as closely in accord with the census figures, and with the objective facts, as is reasonably possible. "Mathematical exactness or precision is hardly a workable con-

stitutional requirement'' (Reynolds v. Sims, 377 U. S. 533, 562). This objection is therefore overruled.

The further objection is raised that the moving parties have failed to sustain their burden of proving that the plan meets the constitutional standard of ''one person-one vote.'' The Court of Appeals pointed out, in the Iannucci case, *supra,* what kind of proof would satisfy that burden. The following quotation from the majority opinion is sufficiently explanatory:

> ''* * * the sole criterion is the mathematical voting power which each legislator possesses in theory—i.e., the indicia of representation—and not the actual voting power he possesses in fact—i.e., the indicia of influence. In order to measure the mathematical voting power of each member of these county boards of supervisors and compare it with the proportion of the population which he represents, it would be necessary to have the opinions of experts based on computer analyses.''

Proof of that precise kind has been furnished here. The Board of Supervisors has submitted the table annexed to the notice of motion and received in evidence as Exhibit L. This table is of the same character as Table II annexed to the February, 1967, opinion of Mr. Justice Nolan (53 Misc 2d 88, at p. 108), except that the figures differ slightly because of the rearrangement of the weighted votes in Yonkers and New Rochelle and the reduction by two of the total vote. It was established that Exhibit L had been prepared by Lee Papayanopoulos, a mathematician and computer expert with the International Business Machines Corporation. Mr. Papayanopoulos was not available as a witness at the hearing in this proceeding, but the proponents of the plan called one of his associates, Jerrold Rubin, also a mathematician and computer expert with the same company. Mr. Rubin testified that with the use of a computer, and employing the same data, he had reached

exactly the same results as shown in Exhibit L. What this exhibit shows is that under the present plan each legislator's share of the total vote correponds, except for minute fractions, with his *effective* voting power as previously defined. These computations comply fully with the requirements laid down by the Court of Appeals in the Iannucci case. They show "the mathematical voting power of each member" of the proposed Board as compared with "the proportion of the population which he represents." They show that no member will be left without the possibility of influencing legislation, and that his actual influence will be in proportion to the number of his constituents.

The opponents of the plan do not seriously challenge the accuracy of this proof. They fall back again on Mr. Banzhaf's theory that it is not the power of the legislator to influence action, but rather the power of the individual citizen to influence his legislator, which ought to be decisive of the validity of the apportionment. It has already been said that this question, as far as the Special Term is concerned, has been foreclosed by the previous ruling. But this court will add its own vote of agreement. No authoritative case has come to the court's attention which supports Mr. Banzhaf's theory. When one considers the number of imponderables which may affect the action of an elected representative in casting his vote on any hypothetical measure, it seems impossible to devise a formula capable of measuring mathematically the constituent's degree of influence upon the result in a practical world.

Procedurally, this motion would appear to be one for summary judgment. The motion is granted. A judgment may be submitted accordingly on notice.

Dated: White Plains, New York, August 23, 1967.

/s/ John J. Dillon.
JOHN J. DILLON,
J. S. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Question Presented	3
Statement of the Case	3
Argument	7
I. *The Commissioners' Court of Midland County is an elective governing body performing legislative and administrative functions.*	7
II. *The equal protection clause applies to the orders of the Commissioners' Court of Midland County.*	11
III. *The "One Man, One Vote" principle of Reynolds v. Sims should apply to the Commissioners' Court of Midland County*	14
Conclusion	20
Certificate of Service	21

Appendix:

	Appendix Page
Constitution of the United States	1
Statutes of the United States	1
Constitution of the State of Texas	2
Statutes of the State of Texas	6
Orders of the Commissioners' Court of Midland County	42, 47

LIST OF AUTHORITIES

CASES	Page
Armentrout v. Schooler, 409 S.W.2d 138 (Mo. Sup. Ct.)	18
Bailey v. Jones, 139 N.W. 385 (S.D. Sup. Ct.)	18
Baker v. Carr, 369 U.S. 186	12, 13
Brown v. Meeks, 93 S.W.2d 839 (Tex. Civ. App., dism.)	7
Cooper v. Aaron, 358 U.S. 1, 16-17	11
Delozier v. Tyrone Area School Board, 247 F. Supp. 30 (W.D. Penna.)	13, 18
Dusch v. Davis, 87 S. Ct. 1554, ____U.S.____	12, 14
Ellis v. Mayor and City Council of Baltimore, 234 F. Supp. 945 (D.Md.)	18
Glass v. Hancock County Election Commission, 378 U.S. 558	12, 13
Gomillion v. Lightfoot, 364 U.S. 339	12
Gray v. Sanders, 372 U.S. 368	16, 17
Hanlon v. Towey, 142 N.W.2d 741 (Minn. Sup. Ct.)	18
Home Telegraph and Telephone Co. v. City of Los Angeles, 227 U.S. 278	11
Jopling v. City of LaGrange, 256 S.W.2d 901 (Tex. Civ. App., ref.)	8
Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736-737	14
Miller v. Board of Supervisors, 405 P.2d 857 (Cal. Sup. Ct.)	18
Montgomery County Council v. Garrott, 222 A.2d 164 (Md. Sup. Ct.)	18
Reynolds v. Sims, 377 U.S. 533	3, 13, 14, 15, 16
Sailors v. Board of Education of the County of Kent, 87 S. Ct. 1549, ____U.S.____	12, 14
Seaman v. Tedourich, 209 N.E.2d 778 (N.Y. Ct. App.)	18
Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577	11

CASES	Page
State v. Hetherington, 61 N.W.2d 737 (Minn. Sup. Ct.)	20
State ex rel. Sonneborn v. Sylvester, 132 N.W.2d 249, 255 (Wisc. Sup. Ct. 1965)	18
Tedesco v. Board of Supervisors of Elections for the Parish of Orleans, 339 U.S. 940	12, 13
Wesberry v. Sanders, 376 U.S. 1	16, 17

CONSTITUTION OF THE UNITED STATES	
Fourteenth Amendment, Sec. 1	3

UNITED STATES STATUTES	
28 U.S.C. 1257(3)	3

CONSTITUTION OF THE STATE OF TEXAS	
Article I, Secs. 3 and 19	3
Article V, Sec. 15	7
Article V, Sec. 18	3, 4, 7, 10, 15
Article VII, Secs. 9 and 18	3
Article VIII, Sec. 9	8
Article VIII, Sec. 18	8
Article XVI, Sec. 61	3
Article XVII, Sec. 1	7

VERNON'S TEXAS CIVIL STATUTES	
Articles 2.04 and 3.01	3, 10
Article 689a-9	3, 8, 9
Article 689a-9a	3, 8, 9
Article 689a-10	3, 8, 9
Article 689a-11	3, 8, 9
Article 796	3
Article 797	3
Article 976	8
Article 1015c	3, 9
Article 1269h	3, 9
Article 1572	3, 7

	Page
Article 1581e	3, 9, 10
Article 1659	3, 8
Article 1677	3, 9
Article 2339	3
Article 2342	3
Article 2350(a)	3, 8
Article 2351, Secs. 1-20	3, 8, 9, 10
Article 2351a-1	3, 9
Article 2351f	3, 9
Article 2351q	3, 9
Article 2352	3, 8
Article 2352d	3, 11
Article 2355	3, 10
Article 2356	3, 10
Article 2370, Sec. 1	3, 8
Article 2372d-2	3, 10
Article 3264a	3, 10
Article 4436a-1	3, 9
Article 4478	3, 9
Article 4492	3
Article 6081f	3
Article 6626	3, 10
Article 6701d, Sec. 169	3, 9
Article 7345d	8

NO. 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HANK AVERY, *Petitioner*

v.

MIDLAND COUNTY, TEXAS, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions delivered by the courts below are not reported officially.

The majority opinion of the Supreme Court of Texas (R. 141-151) is unofficially reported at 406 S.W.2d 422. The dissenting opinion of such court (R. 151-159) is unofficially reported at 406 S.W.2d 429. The opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas (R. 134-140), is unofficially reported at 397 S.W.2d 919.

JURISDICTION

This suit was instituted in a State District Court seeking to have the current and all prior Orders of the Commissioners' Court of Midland County, Texas, dividing the County into Commissioners' Precincts set aside and said Commissioners' Court directed to redivide the County into Commissioners' Precincts so that each such Precinct would have substantially the same number of people (R. 1-16). This right was claimed under Article V, Sec. 18 and Article I, Secs. 3 and 19 of the Constitution of the State of Texas and under Sec. 1 of the Fourteenth Amendment of the Constitution of the United States.

The Judgment of the Supreme Court of Texas was entered on July 13, 1966 (R. 141). Within 15 days thereafter, the time provided by the Texas Rules of Civil Procedure, a motion for rehearing was filed by Petitioner (R. 161); such motion was overruled, without written opinion, on October 12, 1966 (R. 163). Petition for Writ of Certiorari to the Supreme Court of Texas was filed on January 10, 1967; such Petition was granted by this Court on June 12, 1967 (R. 164).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Literally hundreds of statutes of the State of Texas relate to the functions of County government. However, for the sake of brevity, only statutes representative of the general character, duties, and responsibilities of the governing body (Commissioners' Court) of a County are cited herein.

Fourteenth Amendment, Sec. 1, United States Constitution, Appendix infra, p. 1; 28 U.S.C. Sec. 1257(3), Appendix infra, p. 1; and Article I, Secs. 3 and 19, Article V, Sec. 18, Article VIII, Secs. 9 and 18, and Article XVI, Sec. 61, Constitution of Texas, Appendix infra, pp. 2-6. The following enactments of the Texas Legislature: Articles 689a-9, 689a-9a, 689a-10, 689a-11, 796, 797, 1015c, 1269h, 1572, 1581e, 1659, 1677, 2339, 2342, 2350(2), 2351, Secs. 1-20, 2351a-1, 2351f, 2351q, 2352, 2352d, 2355, 2356, 2370, Sec. 1, 2372d-2, Election Code, Articles 2.04 and 3.01, 3264a, 4436a-1, 4478, 4492, 6081f, 6626, 6701d, Sec. 169, Vernon's Texas Civil Statutes, Appendix infra, pp. 6-39. Orders of the Commissioners' Court of Midland County, Texas, dated August 31, 1963 and January 7, 1964, Appendix infra, pp. 42-51.

QUESTION PRESENTED

Whether the Fourteenth Amendment's equal protection clause permits the continuation of the practice of the Commissioners' Court of Midland County to divide said County into Commissioners' Precincts so grossly disproportionate in population that less than five percent of the County's total population elects a majority of the members of the Commissioners' Court, the County's governing body. Specifically, whether the principle of "one man—one vote" enunciated in *Reynolds v. Sims*, 377 U.S. 533 is applicable to the election by precinct of the members of the governing body of Midland County, Texas.

STATEMENT OF THE CASE

The State of Texas contains 254 counties. Each county has its own governing body, called the Commissioners' Court. Such governing body is composed of five members

—a County Judge, who is elected county-wide, and four County Commissioners, each of whom is elected by the voters of the Commissioner's Precinct in which he resides. The County Judge is the presiding officer of the Commissioners' Court, but may vote on matters under consideration by that body only in the event of a tie. The division or revision of the County into the four Commissioners' Precincts is the responsibility of the Commissioners' Court. Article V, Section 18, Constitution of Texas, Appendix infra p. 2.

The county in issue, Midland County, is square in shape; it contains 900 square miles, approximately 70,000 people, and one incorporated municipality—the City of Midland. County Commissioner's Precinct No. 1, which includes virtually all of the City of Midland, is predominantly urban in character; Commissioners' Precincts Nos. 2, 3, and 4 are predominantly rural in character (R. 43, 44, 101-102).

Petitioner, a citizen, taxpayer, and voter of the United States, the State of Texas, Midland County, and County Commissioner's Precinct No. 1, brought this action, individually and on behalf of others similarly situated, against Respondents to set aside an Order of the County Commissioners' Court dividing the County into four new Commissioners' Precincts. Such Order was adopted by Respondents on August 31, 1963, to become effective on January 1, 1964. Petitioner further sought to have said Respondent Commissioners directed to redivide said County into Commissioners' Precincts having substantially the same number of people (R. 1-16).

The Trial Court granted this relief (R. 130-133); however, the Appellate Courts, including the Supreme Court of Texas, denied Petitioner relief in his effort to require

the Commissioners' Court to redistrict the County into four Commissioners' Precincts substantially equal in population (R. 141).

The Federal Question involved here was raised in the Trial Court by the Petition upon which Petitioner went to trial (R. 1; 12), and in the Supreme Court of Texas by assignment of errors, as reflected by the opinion of that court (R. 141).

The facts in this case are simple and clear. The following unchallenged findings are among those made by the Trial Court in support of its judgment:

1. On August 31, 1963, the Respondents Gideon, Bryant, Moreland, and Osborne, constituting and acting as members of the Commissioners' Court of Midland County, adopted an Order dividing the County into four new Commissioners' Precincts, the boundaries thereof to become effective on January 1, 1964 (R. 130).

2. The division effected by such Order made only insignificant changes in the Commissioners' Precincts as they existed prior to such Order (R. 131).

3. On the date of such Order, Midland County had a population of approximately 70,000 persons and in excess of 95 percent of such population resided in the new Commissioner's Precinct No. 1 (R. 131).

4. On the date of such Order, in excess of 97 percent of the qualified voters of such County shown on the certified list of qualified voters prepared by the County Tax Assessor-Collector resided in the new Commissioner's Precinct No. 1 (R. 131).

As they relate to the four precinct-elected members of the Commissioners' Court, the foregoing facts and figures

clearly establish that more than 95 percent of the population (predominantly urban) is accorded only 25 percent representation on the County's governing body, while less than five percent of the population (predominantly rural) is accorded 75 percent representation on such governing body. In a County having a population of 70,000 people, less than 3,500 can and do elect a majority of the members of the Commissioners' Court, thereby exercising perpetual veto power over the will of more than 66,500 people. Assuming total population participation in such an election, a voter from Commissioner's Precinct No. 2, 3 or 4 (the rural voter) possesses 57 times the voting power of a voter from Commissioner's Precinct No. 1 (the urban voter). Assuming total qualified voter participation in such an election, a voter from Commissioner's Precinct No. 2, 3, or 4 (the rural voter) possesses 97 times the voting power of a voter from Commissioner's Precinct No. 1 (the urban voter).

The Trial Court's judgment recited these further findings:

1. The action of the Respondents in passing and approving such Order constituted invidious discrimination (R. 132).

2. The County could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population and other pertinent factors which would have been and would be practical and for the convenience of the people (R. 131).

3. The principal purposes of the Respondents, or a majority thereof, in passing and approving such Order were for political expediency, to maintain the status quo, and to insure that the rural areas of the County would continue to elect a majority of the members of the Commissioners' Court (R. 132).

ARGUMENT

I. The Commissioners' Court of Midland County is an elective governing body performing legislative and administrative functions.

In Texas, a County is a body corporate and politic,[1] a political subdivision, a subordinate and derivative branch of State government. It is governed by a Commissioners' Court. The composition of such governing body and the method of selecting its members are standard. Each County is divided into four Commissioners' Precincts; this division, which may be changed from time to time, is the exclusive responsibility and privilege of the Commissioners' Court of the County. The qualified voters of each such Precinct elect a County Commissioner. These four Commissioners together with the County Judge, who is elected county-wide, comprise the Commissioners' Court.

The foregoing standards are established by the Texas Constitution;[2] they could be modified only by constitutional amendment.[3]

A Commissioners' Court derives its powers from the Constitution and laws of the State; its functions are both legislative[4] and administrative. It typifies representative government at the local level—and its actions have a profound effect on the health, safety, and welfare of those it governs.

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1. Article 1572, V.T.C.S.
2. Article V, Secs. 18 and 15, Texas Constitution.
3. This may be accomplished in Texas only if the proposed amendment is approved by two-thirds of the full membership of each House of the Texas Legislature and by a majority of the qualified voters of the State voting on such proposition in a State-wide election. Article XVII, Sec. 1, Texas Constitution.
4. *Brown v. Meeks*, 93 S.W.2d 839 (Tex. Civ. App., dism.).

Perhaps no power possessed by the Commissioners' Court is more legislative in character than the very matter giving rise to this complaint—the authority of the precinct-elected representatives (Commissioners) to establish or reestablish the boundaries of the precincts from which they are elected. However, this is but one of many constitutional and statutory powers conferred on a Commissioners' Court. Others were summarized by the Respondents themselves during the trial of this cause (R. 59-64, 97-99); a multitude of others have been delegated to the County governing body. Though by no means all inclusive, the following are illustrative of the authorized duties and responsibilities of a Commissioners' Court:

TAX. To levy taxes for general County purposes and to retire bonded debt;[5] to establish the tax rate;[6] to serve as a Board Equalization[7] to equalize property values for ad valorem tax purposes; to alter the percentage of value at which property will be taxed;[8] and to adjust disputed tax claims.[9]

FISCAL. To adopt a budget for all County expenditures;[10] to set salaries for all County officials and employees, including members of the Commissioners' Court;[11] to make all purchases;[12] to lease County property, including mineral estates;[13] to settle debts;[14] to au-

5. Article 2352, V.T.C.S.; Article VIII, Sec. 9, Texas Constitution.
6. Id., (R. 97).
7. Article VIII, Sec. 18, Texas Constitution; (R. 61)
8. *Jopling v. City of LaGrange*, 256 S.W.2d 901 (Tex. Civ. App., ref.).
9. Article 7345d, V.T.C.S.
10. Article 689a-9, 9a, 10, 11, V.T.C.S.
11. Id., Article 2350(2), V.T.C.S., (R. 59, 91).
12. Article 1659, V.T.C.S.; (R. 59, 91).
13. Articles 2351, Sec. 18c, and 2370, Sec. 1, V.T.C.S.
14. Article 976, V.T.C.S.

thorize andits;[15] and to create a revolving fund for welfare purposes.[16]

HEALTH. To own and operate hospitals;[17] to acquire and operate garbage dumps;[18] to clean streams;[19] to participate in City-County health units;[20] to provide medical care for the indigent;[21] and to bury paupers.[22]

SAFETY. To provide fire protection;[23] to establish speed limits;[24] to provide flood control;[25] and to control, through budgeting practices, the extent and quality of police protection available to citizens by determining the number of deputies and the equipment available to the Sheriff's Department and to the Constables' offices.[26]

PUBLIC FACILITIES. To acquire, own, operate, and regulate hospitals,[27] libraries,[28] airports,[29] ferries,[30] cemeteries,[31] public housing, [32] water works,[33] and parks and recreational facilities.[34]

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15. Article 2351, Sec. 10, V.T.C.S.
16. Article 2351, Sec. 17a, V.T.C.S.
17. Article 4478, V.T.C.S.
18. Article 2351q-1, V.T.C.S.
19. Article 2351, Sec. 16, V.T.C.S.
20. Articles 4436a-1 and 4492, V.T.C.S.
21. Id.; Article 2351, Sec. 11, V.T.C.S.
22. Article 2351, Sec. 12, V.T.C.S.
23. Article 2351a-1, V.T.C.S.
24. Article 6701d, Sec. 169, V.T.C.S.
25. Article 1581e, V.T.C.S.
26. Articles 689a-9, 9a, 10, 11, V.T.C.S.; (R. 59, 97).
27. Article 4478.
28. Article 1677, V.T.C.S.
29. Articles 1269h and 2351, Sec. 18a, V.T.C.S.
30. Article 2351, Sec. 2, V.T.C.S.
31. Article 2351f, V.T.C.S.
32. Article 2351, Sec. 19a-e, V.T.C.S.
33. Article 2351, Sec. 20, V.T.C.S.
34. Articles 1015c-1 and 6081f, V.T.C.S.

PUBLIC BUILDINGS. To acquire or construct public buildings, including courthouses;[35] jails,[36] and auditoriums and coliseums.[37]

ROADS AND BRIDGES. To acquire the right-of-way for and to construct, maintain, and control roads and bridges.[38]

EMINENT DOMAIN. To exercise the power of eminent domain for any authorized public purpose,[39] including roads, public facilities, public buildings, and flood control.[40]

PRECINCT BOUNDARIES. To divide the County from time to time into Commissioners' Precincts, Justice of the Peace Precincts, and Election Precincts.[41]

ELECTIONS. To call elections, to appoint election officials, and to canvass returns and declare the results of elections.[42]

MISCELLANEOUS. To regulate the subdivision of land;[43] to issue and sell bonds;[44] to fill vacancies in elective County offices;[45] to punish for contempt;[46] to cooperate with the Federal Government in the construction of public works;[47] and to create a Board of Development

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35. Articles 2351, Sec. 7 and 2370, Sec. 1, V.T.C.S.
36. Id.
37. Article 2372d-2, V.T.C.S.
38. Articles 2351, Secs. 3-6, 2352, and 2356, V.T.C.S.
39. Article 3264a, V.T.C.S.
40. Id.; Article 1581e, V.T.C.S.
41. Article V, Sec. 18, Texas Constitution; Article 2.04, Election Code, V.T.C.S.
42. Articles 3.01 and 4.02, Election Code, V.T.C.S.; (R. 60).
43. Article 6626, V.T.C.S.
44. (R. 64, 97).
45. Article 2355, V.T.C.S.
46. Article 2351, Sec. 13, V.T.C.S.
47. Article 2351, Sec. 19a-e, V.T.C.S.

for the purpose of advertising and promoting the growth and development of the County.[48]

Petitioner respectfully submits that the foregoing clearly indicate that the Commissioners' Court, the elective governing body of Midland County, performs both legislative and administrative functions.

II. The equal protection clause applies to the orders of the Commissioners Court of Midland County.

This Court has traditionally held that the protection afforded a citizen under the Fourteenth Amendment blankets the action of the State and all its subordinate units of government. *Home Telegraph and Telephone Co. v. City of Los Angeles,* 227 U.S. 278. To hold otherwise would permit a State, through delegation of its authority, to accomplish indirectly that which it cannot constitutionally accomplish directly. To prevent such circumvention of a federally protected right, the action of a political subdivision is properly regarded as the action of the State itself. *Cooper v. Aaron,* 358 U.S. 1, 16-17.

Here, acting under a conferred power, the Commissioners' Court of Midland County adopted an Order perpetuating gross malapportionment of Commissioners' Precincts, thereby debasing the weight of Petitioner's vote. Such action clearly violates the Equal Protection Clause; it is totally incompatible with the rule of law succinctly stated in *Standard Computing Scale Co. v. Farrell,* 249 U.S. 571, 577:

> ". . . The protection of the Federal Constitution applies, whatever the form in which the legislative

48. Article 2352d, V.T.C.S.

> power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission . . .".

Enforcing the provisions of the Fifteenth Amendment, this Court, in *Gomillion v. Lightfoot,* 364 U.S. 339, struck down an alteration of municipal boundaries which had the effect of disfranchising Negroes. In so doing, the Court held that municipalities, no less than the State, are subject to relevant constitutional limitations—to hold otherwise would be to "sanction the achievement by a State of any impairment of voting rights so long as it was cloaked in the garb of the realignment of political subdivisions." (p. 345).

It would appear that the foregoing authorities leave the inescapable conclusion that the Equal Protection Clause, as it relates to the apportionment of a governmental unit, must apply to the Commissioners' Precincts of Midland County. Respondents, no doubt, will take a contrary view, urging that no part of the Fourteenth Amendment should apply to the matter in issue. Those who assume such a position frequently rely on *Tedesco v. Board of Supervisors of Elections for the Parish of Orleans,* 339 U.S. 940; *Glass v. Hancock County Election Commission,* 378 U.S. 558, and, more recently, *Sailors v. Board of Education of the County of Kent,* 87 S. Ct. 1549, ____U.S. ____, and *Dusch v. Davis,* 87 S.Ct. 1554, ____U.S.____. For this reason, a brief discussion of these cases seems appropriate.

At the outset, it should be noted that neither *Tedesco* nor *Glass* was decided on the merits. The former, decided more than a decade before *Baker v. Carr,* 369 U.S. 186,

concerned city council districts in New Orleans. The challenge to such districts was predicated on the Privileges and Immunities Clause of the Fourteenth Amendment; the Equal Protection Clause was not invoked. (See *Baker v. Carr,* 369 U.S. 186, 252, n. 2.). Concluding that no constitutional issue was present, the State court dismissed the cause; an appeal to this Court was dismissed for want of a substantial federal question. Years later, this Court, discussing *Tedesco* in the *Baker* opinion distinguished the former by stating "that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting." (369 U.S. 186, 235). It is respectfully submitted that the substantive standards set forth in *Reynolds v. Sims,* 377 U.S. 533, negate any future reliance on "rational justification" in redistricting cases. In addition, *Tedesco* and the authority on which it relied were thoroughly distinguished and undermined in *Baker v. Carr;* a comprehensive discussion and analysis of the treatment of *Tedesco* in the *Baker* decision is found in *Delozier v. Tyrone Area School Board,* 247 F. Supp. 30 (W.D. Penn.).

In *Glass,* a case originating in Mississippi, Plaintiffs sought to enjoin the holding of an election for County Supervisors until County beats were redistricted to conform to population changes. However, the State statute involved provided for initiative petition for an election to change the boundaries of County beats; therefore, the Mississippi Supreme Court merely held that injunction would not issue if there was an adequate remedy at law—and that initiative was such an adequate remedy. *Glass v. Hancock County Election Commission,* 156 So.

2d 825 (Miss. Sup. Ct., 1963). This Court dismissed the appeal for want of jurisdiction and also denied certiorari. It should be noted that in the instant case Petitioner had no remedy other than the one he is presently pursuing through the courts; it should also be noted that this court has now held that the availability of a political remedy does not justify continued malapportionment. *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737.

Sailors v. Board of Education of County of Kent, 87 S. Ct. 1549,____U.S.____, is clearly distinguishable from the case under consideration. There, the members of the County School Board occupied appointive, nonlegislative offices. Here, the members of the Commissioners' Court of Midland County occupy elective, legislative and administrative offices.

The last case, *Dusch v. Davis,* 87 S. Ct. 1554, ____U.S. ____, is without analogy to the present action. There, though seven of the councilmen had borough residence requirements, they were elected at large. Here, each of the County Commissioners is elected from a separate precinct.

III. The "One Man, One Vote" principle of *Reynolds v. Sims* should apply to the Commissioners' Court of Midland County.

The Commissioners' Court is the governing body of Midland County. Under the Constitution of the State of Texas, its four Commissioner-members are elected by Precinct. Under the same Constitution, these officials are charged with the responsibility of dividing the County

"from time to time, for the convenience of the people" into Commissioners' Precincts. *Texas Constitution,* Article V, Sec. 18.

Throughout the progression of this cause in the State Courts, Petitioner consistently maintained that such Constitutional provision should be construed in a fashion calculated to achieve compatibility with the Equal Protection Clause of the Fourteenth Amendment. This seemed a logical approach; both relate to people,—the lesser to convenience, the greater to equal protection of the laws. However, only the Trial Court concurred. The State Supreme Court concluded that the basic problem involved was the extent of political power the metropolitan area should have in relation to the rural area. That Court gave consideration to population, but subordinated, or at least equated, it to other factors, such as miles of county roads, land area, geography and taxable values. It is respectfully submitted that this was error. The Fourteenth Amendment grants equal protection to the citizen, and only the citizen —and this regardless of where he lives, whether he be of the majority or the minority, whether he be urban or rural. No other factor, be it miles of County roads, land area, geography, or taxable values, should deny him this protection nor justify the debasement of his vote. These, we submit, were fundamental considerations in the development of the "one man, one vote" principle enunciated in *Reynolds v. Sims,* 377 U.S. 533, and should logically serve as a basis for extending that principle to appropriate local units of governments, such as the Commissioners' Court of Midland County, Texas. Only through such an extension will Petitioner enjoy a full measure of citizenship in the County.

This Court has treated with meticulous care the right to vote and the nature of representative government in this land in such cases as *Reynolds v. Sims*, 377 U.S. 533, *Gray v. Sanders*, 372 U.S. 368, and *Wesberry v. Sanders*, 376 U.S. 1. The temptation to quote extensively from these decisions is strong. Though none dealt directly with local governmental bodies, each contained language most persuasive of the logical application of the equal-population principle to apportionment at the local level. The following brief excerpts are particularly pertinent and penetrating when related to the situation in Midland County:

Reynolds v. Sims

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of franchise." (377 U.S. 555).

". . . The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence . . ." (377 U.S. 560-561).

". . . The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . ." (377 U.S. 562).

"Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically . . ." (377 U.S. 563).

". . . Representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes . . ." (377 U.S. 565).

"Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment . . . the weight of a citizen's vote cannot be made to depend on where he lives." (377 U.S. 566-567).

Gray v. Sanders

". . . There is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters . . ." (372 U.S. 380).

Wesberry v. Sanders

". . . To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . ." (376 U.S. 7-8).

"Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." (376 U.S. 17).

Petitioner earnestly submits that the foregoing precepts are as applicable to the governing body of Midland County as they are to a State Legislature and thus require that the County's Commissioners' Precincts be substantially equal in population. The Constitution of Texas grants to Petitioner and the other citizens of Midland County the right to elect the members of the Commissioners' Court. It would seem totally inconsistent with the Equal Protec-

tion Clause as construed in *Reynolds v. Sims* to permit such governing body to classify these citizens on any basis other than population.

The great weight of authority in State and lower Federal Courts support the application of the "one man, one vote" principle to local governing bodies. Characteristic of these decisions is *State ex rel. Sonneborn v. Sylvester*, 132 N.W.2d 249, 255 (Wisc. Sup. Ct., 1965):

> "Since the basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives, then county boards or units of representative government should not be constitutionally immune from the requirements of the 14th Amendment . . ."

Other cases of like import are: *Miller v. Board of Supervisors*, 405 P.2d 857 (Cal. Sup. Ct.), *Montgomery County Council v. Garrott*, 222 A.2d 164 (Md. Sup. Ct.), *Hanlon v. Towey*, 142 N.W.2d 741 (Minn. Sup. Ct.), *Armentrout v. Schooler*, 409 S.W.2d 138 (Mo. Sup. Ct.), *Seaman v. Tedourich*, 209 N.E.2d 778 (N. Y. Ct. App.), *Bailey v. Jones*, 139 N.W. 385 (S.D. Sup. Ct.), *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945 (D. Md.), *Delozier v. Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Penn.) and *Strickland v. Burns*, 256 F. Supp. 824 (M.D. Tenn.).

Each of these decisions supports the proposition that the equal-population principle should be extended to subordinate units of government; with reference to the requirements of the Equal Protection Clause, each cogently reasons that no material difference exists between the right to vote for State Legislators and members of local governing bodies.

In Midland County, more than 95 percent of the people elect, and are represented by, one Commissioner; less than 5 percent of the people elect, and are represented by, three Commissioners. The voice and the vote of the many have been diluted and debased; the will of the many has been subordinated to the will of the few. County government is in the hands of a small minority of the County's citizens. The testimony of one of this minority's representatives, Respondent Bryant, would indicate that it is there to stay unless wrest away by the stronger hand of constitutional principle.

When asked if he felt that a majority of the Commissioners' Court must be composed of rural representatives, he replied, "Yes sir, I do." And when asked if he felt the only way this majority representation of rural interests on the Commissioners' Court could be maintained was by dividing the County into Commissioners' Precincts in such a fashion that the vast majority of people was placed in one Precinct segregated from the other three, he replied, "Yes sir, that's correct" (R. 126).

Obviously, arbitrary power has challenged the rule of the Constitution; they are antagonistic and incompatible forces and one or the other must perish. Certainly, there can be no doubt as to which it must be.

> "The right to vote on a basis of reasonable equality with other citizens is a fundamental and personal right essential to the preservation of self-government. Fundamental rights may be lost by dilution as well as by outright denial. To whatever extent a citizen is disfranchised by denying him reasonable equality of representation, to that extent he endures taxation without representation and the democratic process itself fails to register the full weight of his judgment

as a citizen." *State v. Hetherington*, 61 N.W.2d 737, (Minn. Sup. Ct.).

Petitioner submits that consistent and logical constitutional construction compels the extension of the "one man, one vote" principle to the elective process in Midland County. Though smaller in size and local in nature, the Commissioners' Court is, nonetheless, representative government. As interpreted by this Court, the Equal Protection Clause requires that State legislators be elected from districts substantially equal in population; reason and fairness would direct that the same standards should apply to the election of the members of the Commissioners' Court of Midland County, Texas, which exercises powers delegated to it by the State legislature over a wide range of subjects. The right of the citizens should be the same regardless of whether the power is exercised directly by the Legislature or by a subordinate elective body.

CONCLUSION

The jurisdiction and power to enforce the rights granted to Petitioner by the Fourteenth Amendment are vested in this Court. Petitioner has no other remedy. The Equal Protection Clause as construed by this Court entitles Petitioner to the relief sought.

Wherefore, Premises considered, Petitioner prays that the decision of the Supreme Court of Texas be reversed and that this cause be remanded with instructions that the Commissioners' Court of Midland County, Texas, redivide such County into Commissioners' Precincts having substantially the same number of people and with the further instructions that until such time as such redivision is accomplished, each member of the Commissioners' Court

APPENDIX

CONSTITUTION OF THE UNITED STATES

UNITED STATES CONSTITUTION, Amendment XIV, § 1:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE UNITED STATES

28 U.S.C. Sec. 1257 (3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

CONSTITUTION OF THE STATE OF TEXAS

Art. I, § 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

Art. I, § 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Art. V, § 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County

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Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

Art. VIII, § 9. Maximum state tax; county, city and town levies; local road laws

Sec. 9. The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools, shall never exceed thirty-five (35) cents on the one hundred dollars valuation; and no county, city or town shall levy more than twenty-five (25) cents for city or county purposes, and not exceeding fifteen (15) cents for roads and bridges, and not exceeding fifteen (15) cents to pay jurors, on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the Amendment September 25, 1883; and for the erection of public buildings, streets, sewers, waterworks and other permanent improvements, not to exceed twenty-five (25) cents on the one hundred dollars valuation, in any one year, and except as is in this Constitution otherwise provided; provided, however, that the Commissioners Court in any county may re-allocate the foregoing county taxes by changing the rates provided for any of the foregoing purposes by either increasing or decreasing the same, but in no event shall the total of said foregoing county taxes exceed eighty (80) cents on the one hundred dollars valuation, in any one year; provided further,

that before the said Commissioners Court may make such re-allocations and changes in said county taxes that the same shall be submitted to the qualified property tax paying voters of such county at a general or special election, and shall be approved by a majority of the qualified property tax paying voters, voting in such election; and, provided further, that if and when such re-allocations and changes in the aforesaid county taxes have been approved by the qualified property tax paying voters of any county, as herein provided, such re-allocations and changes shall remain in force and effect for a period of six (6) years from the date of the election at which the same shall be approved, unless the same again shall have been changed by a majority vote of the qualified property tax paying voters of such county, voting on the proposition, after submission by the Commissioners Court at a general or special election for that purpose; and the Legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property tax paying voters of the county voting at an election to be held for that purpose shall vote such tax, not to exceed fifteen (15) cents on the one hundred dollars valuation of the property subject to taxation in such county. And the Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws. This section shall not be construed as a limitation of powers delegated to counties, cities or towns by any other section or sections of this Constitution. As amended Aug. 14, 1883, proclamation Sept. 25, 1883; Nov. 4, 1890, proclamation Dec. 19, 1890; Nov. 6, 1906, proclamation Jan. 7, 1907; Nov. 7, 1944.

Art. VIII, § 18. Equalization of valuations; classification of lands

Sec. 18. The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation, (the County Commissioner's Court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in the several counties.

Art. XVI, § 61. Compensation of district, county and precinct officers; salary or fee basis; disposition of fees

Sec. 61. All district officers in the State of Texas and all county officers in counties having a population of twenty thousand (20,000) or more, according to the then last preceding Federal Census, shall be compensated on a salary basis. In all counties in this State, the Commissioners Courts shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts, to compensate all constables, deputy constables and precinct law enforcement officers on a salary basis beginning January 1, 1949; and in counties having a population of less than twenty thousand (20,000), according to the then last preceding Federal Census, the Commissioners Courts shall also have the authority to determine whether county officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts to compensate all sheriffs, deputy sheriffs, county law enforcement officers including sheriffs who also perform the duties of assessor and collector of taxes,

and their deputies, on a salary basis beginning January 1, 1949.

All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is compensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners Court may direct. All Notaries Public, county surveyors and public weighers shall continue to be compensated on a fee basis. Added Aug. 24, 1935, as amended Nov. 2, 1948.

STATUTES OF THE STATE OF TEXAS

Art. 689a—9. V.T.C.S.

The County Judge shall serve as budget officer for the Commissioners' Court in each county, and during the month of July of each year he, assisted by the County Auditor or by the County Clerk, shall prepare a budget to cover all proposed expenditures of the county government for the succeeding year. Such budget shall be carefully itemized so as to make as clear a comparison as practicable between expenditures included in the proposed budget and actual expenditures for the same or similar purposes for the preceding year. The budget must also be so prepared as to show as definitely as possible each of the various projects for which appropriations are set up in the budget, and the estimated amount of money carried in the budget for each of such projects. The budget shall also contain a complete financial statement of the

county, showing all outstanding obligations of the county, the cash on hand to the credit of each and every fund of the county government, the funds received from all sources during the previous year, the funds available from all sources during the ensuing year, the estimated revenues available to cover the proposed budget and the estimated rate of tax which will be required. Acts 1931, 42nd Leg., p. 339, ch. 206, § 10.

Art. 689a—9a. V.T.C.S.

The County Judge in preparing the budget to cover all proposed expenditures of the county government for the succeeding year shall estimate the revenue to be derived from taxes to be levied and collected during such succeeding year, and such revenue shall be included in the estimated revenues available to cover the proposed budget. Acts 1931, 42nd Leg., p. 339, ch. 206, § 10a, added Acts 1953, 53rd Leg., p. 1056, ch. 439, § 1.

Art. 689a—10. V.T.C.S.

When the County Judge has completed the budget for the county, a copy of it shall be filed with the clerk of the County Court, and it shall be available for the inspection of any taxpayer. Acts 1931, 42nd Leg., p. 339, ch. 206, § 11.

Art. 689a—11. V.T.C.S.

The Commissioners' Court in each county shall each year provide for a public hearing on the county budget—which hearing shall take place on some date to be named by the Commissioners' Court subsequent to August 15th and prior to the levy of taxes by said Commissioners'

Court. Public notice shall be given that on said date of hearing the budget as prepared by the County Judge will be considered by the Commissioners' Court. Said notice shall name the hour, the date and the place where the hearing shall be conducted. Any taxpayer of such county shall have the right to be present and participate in said hearing. At the conclusion of the hearing, the budget as prepared by the County Judge shall be acted upon by the Commissioners' Court. The Court shall have authority to make such changes in the budget as in their judgment the law warrants and the interest of the taxpayers demand. When the budget has been finally approved by the Commissioners' Court, the budget, as approved by the Court shall be filed with the Clerk of the County Court, and taxes levied only in accordance therewith, and no expenditure of the funds of the county shall thereafter be made except in strict compliance with the budget as adopted by the Court. Except that emergency expenditures, in case of grave public necessity, to meet unusual and unforeseen conditions which could not, by reasonably diligent thought and attention, have been included in the original budget, may from time to time be authorized by the Court as amendments to the original budget. In all cases where such amendments to the original budget is made, a copy of the order of the Court amending the budget shall be filed with the Clerk of the County Court, and attached to the budget originally adopted.

The County Judge shall, after the adoption of the county budget and prior to October 15th of each year, file with the State Comptroller at Austin, Texas, a true and correct summarized statement of the adopted budget, which statement shall show the total amount adopted for each of the several divisions of the county's activities and

outstanding obligations together with true and exact copies of any revenue estimates, financial statements and balance sheets required to be contained in said budgets, and the correctness of said copies shall be sworn to by the County Judge and County Auditor, and in counties which have no County Auditor, by the County Clerk. The State Comptroller shall note the date on which statements are filed with him, and preserve them for not less than two (2) years after the October 1st filing date. Provided, however, that in all counties of this State containing a population in excess of three hundred and fifty thousand (350,000), according to the last preceding United States census, the provisions hereof shall not apply to the making of such county budgets, and in such counties all matters pertaining to the county budget shall be governed by existing law. Acts 1931, 42nd Leg., p. 339, ch. 206, § 12.

Art. 796. V.T.C.S.

Any county or any city incorporated under the general laws which may suffer great destruction or damage of property or depreciation of the value of taxable property from storms, floods or other disasters, may fund, refund, compromise or settle its valid outstanding bonded and floating indebtedness. Acts 1901, S.S. p. 18.

Art. 797. V.T.C.S.

For such purpose, the bonds of the county or city may be issued by the governing body without a vote of the tax payers in denominations of not less than one hundred, nor more than one thousand dollars each, for an amount sufficient to consummate such compromise or settlement, not to exceed the amount unpaid on the outstanding indebtedness. Such bonds may be exchanged for bonds or

other evidences of outstanding indebtedness of such county or city, or may be sold and the proceeds applied in the purchase of outstanding bonds or the payment of outstanding floating indebtedness, and may be exchanged or sold from time to time in such amounts as may be required for refunding said outstanding bonds and funding or settling said floating debts. Id.

Art. 1015c—1. V.T.C.S.

Purpose

Section 1. The purpose of this Act is to promote the establishment, operation and support of public recreational facilities and programs by local government units of this State either singly or jointly.

Definitions

Sec. 2. As used in this Act:

(a) The term "governing body" means any city council, city commission, county commissioners court, or other body acting in lieu thereof.

(b) The term "governmental unit" means any city, town, or county.

(c) The term "board" means any board, commission, committee or council appointed or designated to carry out the provisions of this Act.

Recreational powers

Sec. 3. Any governmental unit may establish, provide, acquire, maintain, construct, equip, operate, and supervise recreational facilities and programs, either singly or jointly in cooperation with one (1) or more other governmental units.

Elections

Sec. 4. Any governmental unit may submit the question of whether it shall exercise the powers conferred in Section 3 to an election of the qualified electors of such unit.

Finances

Sec. 5. Any governmental unit may pay costs and expenses of carrying out the provisions of this Act from the general revenues of the unit, or from other revenues now provided by law for the establishment or the operation of parks and recreational facilities. Governmental units jointly exercising the powers conferred in Section 3 may agree upon the manner and method of division of costs and expenses.

Administration

Sec. 6. A governing body may administer and operate recreational facilities and programs through a bureau or department of recreation or through a board established jointly with another governing body. The Board shall adopt and promulgate rules and regulations for administration and operation of recreational facilities and programs in its charge subject to the approval of the establishing governing bodies.

Acceptance of gifts

Sec. 7. Any governmental unit may accept any grant, lease, loan or devise of real estate, or gift or bequest of money, either principal or income, or any other personal property for either temporary or permanent use for the establishment, operation, or support of public recreation facilities and programs.

Limitations

Sec. 8. This Act shall be cumulative as to all laws, ordinances, and charter provisions relating to public recreation and parks. Acts 1955, 54th Leg., p. 1179, ch. 458.

Art. 1269h. V.T.C.S.

Section 1. A—The governing body of any incorporated city in this State may receive through gift or dedication, and is hereby empowered to acquire, by purchase without condemnation or by purchase through condemnation proceedings, and thereafter maintain and operate as an airport, or lease, or sell, to the Federal Government, tracts of land either within or without the corporate limits of such city and within the county in which such city is situated, and the Commissioners Court of any county may likewise acquire, maintain and operate for like purpose tracts of land within the limits of the county.

Acts 1941, 47th Leg., ch. 51, p. 65.

Article 1572. V.T.C.S.

Each county which now exists or which may be hereafter established, shall be a body corporate and politic. P.D. 1044.

Art. 1581e. V.T.C.S.

Section 1. All counties in this State shall have the right of eminent domain to condemn and acquire real property and easements and right-of-ways over and through all public and private lands for the making and digging of canals, drains, levees and improvements in the county for flood control purposes and for drainage as related to flood control, and for providing necessary

outlets for waters in such counties. No appeal from the finding and assessment of damages by the Special Commissioners appointed for that purpose shall suspend the work for which the land, right-of-way, easement, or other property is acquired. Where, in the judgment of the Commissioners Court, the acquisition of the fee in the land is necessary, condemnation of the fee title may be had; provided, however, that the counties shall not have authority to condemn the fee of, as distinguished from an easement or right-of-way over, across or upon, any property lawfully used or occupied by any public utility, railroad, canal, levee or other person, concern, corporation or body politic devoting its property to a public use.

Sec. 2. The proceedings with respect to condemning lands or interests therein, or other property, for the uses above specified shall be controlled by the statutes regulating such proceedings by counties in other cases, as provided in Article 3264, Revised Statutes of Texas, 1925, et seq.

Sec. 3. The Commissioners Court of any county in this State may contract and agree with any other county, political subdivision, governmental unit, or municipal corporation for the joint acquisition of right-of-ways, or joint construction or maintenance of canals, drains, levees and other improvements for flood control, and drainage as related to flood control, and for making necessary outlets, and maintaining them. Such contracts shall contain such terms, provisions and details as the governing bodies of the respective political subdivisions shall determine to be necessary under all of the facts and circumstances, and may provide that such works may be maintained jointly, or by either one (1) of such political subdivisions,

under its exclusive direction and control, with such contributions toward the expense of such maintenance as the other county or political subdivision may agree to make.

Sec. 3a. Where, in the opinion of the Court, it becomes necessary to condemn an easement, as against persons who also have the power of eminent domain, all expenses involved in the acquisition, construction, and maintenance of the flood control or drainage project shall be the obligation of the county, flood control district or drainage district, as the case may be. Acts 1949, 51st Leg., p. 759, ch. 407.

Art. 1659. V.T.C.S.

Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments, or institutions must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners court, has submitted the lowest and best bid. The county auditor shall advertise the bidding at least once a week for two consecutive weeks in at least one daily newspaper published and circulated in the county. The advertisements shall state where the specifications are to be found, and shall give the time and place for receiving the bids. Publication of the first advertisement shall precede the last day for receiving bids by at least 14 days. All such competitive bids shall be kept on file by the county auditor as a part of the records of his office, and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the county auditor to the county judge and to the commissioners court; and when the bids received are not satis-

factory to the said judge or county commissioners, the auditor shall reject said bids and readvertise for new bids. In cases of emergency, purchases not in excess of $300 may be made upon requisition to be approved by the commissioners court without advertising for competitive bids. As amended Acts 1963, 58th Leg., p. 115, ch. 66, § 1; Acts 1965, 59th Leg., p. 944, ch. 458, § 1.

Art. 1677. V.T.C.S.

The commissioners court of any county may establish, maintain, and operate within their respective counties, county free libraries in the manner and with the functions prescribed in this title. The said court shall also have the power and authority to establish in co-operation with another county or counties a joint free county library for the benefit of the co-operative counties. Acts 2nd C.S. 1919, p. 219.

Art. 2339. V.T.C.S.

Each county shall be divided into four commissioners precincts, and one commissioner shall be elected biennially in each precinct, and each commissioner shall hold his office for two years. Const. art. 5, sec. 18; Acts 1876, p. 51, sec. 3; G.L. vol. 8, p. 887.

Art. 2342. V.T.C.S.

The several commissioners, together with the county judge, shall compose the "Commissioners Court," and the county judge, when present, shall be the presiding officer of said court. Const. art. 5, sec. 18; Acts 1876, p. 51; G.L. vol. 8, p. 887.

Art. 2350(2). V.T.C.S.

The Commissioners Court at its first regular meeting after the effective date of this Act and thereafter at the first regular meeting of each year shall, by order duly made and entered upon the minutes of said Court, fix the salaries of the County Commissioners for such year, within the limits as provided for in this Act. Acts 1945, 49th Leg., p. 280, ch. 204, § 3.

Art. 2351. V.T.C.S.

Each commissioners court shall:

1. Lay off their respective counties into precincts, not less than four, and not more than eight, for the election of justices of the peace and constables, fix the times and places of holding justices courts, and shall establish places in such precincts where elections shall be held; and shall establish justices precincts and justices courts for the unorganized counties as provided by law.

2. Establish public ferries whenever the public interest may require.

3. Lay out and establish, change and discontinue public roads and highways.

4. Build bridges and keep them in repair.

5. Appoint road overseers and apportion hands.

6. Exercise general control over all roads, highways, ferries and bridges in their counties.

7. Provide and keep in repair court houses, jails and all necessary public buildings.

8. Provide for the protection, preservation and disposi-

tion of all lands granted to the county for education or schools.

9. Provide seals required by law for the district and county courts.

10. Audit and settle all accounts against the county and direct their payment.

11. Provide for the support of paupers and such idiots and lunatics as cannot be admitted into the lunatic asylum, residents of their county, who are unable to support themselves. By the term resident as used herein, is meant a person who has been a bona fide inhabitant of the county not less than six months and of the State not less than one year.

12. Provide for the burial of paupers.

13. Punish contempts by fine not to exceed twenty-five dollars or by imprisonment not to exceed twenty-four hours, and in case of fine, the party may be held in custody until the fine is paid.

14. Issue all such notices, citations, writs and process as may be necessary for the proper execution of the powers and duties imposed by such court and to enforce its jurisdiction.

15. Said court shall have all such powers and jurisdiction, and shall perform all such other duties, as are now or may hereafter be prescribed by law. Const. art. 5; Acts 1876, p. 51; G.L. vol. 8; p. 887; Acts 1885, p. 89; G.L. vol. 9, p. 708; Acts 1911, p. 236.

16. Said Court shall have the authority to use county road machinery and funds from the General Fund or Road and Bridge Funds in cleaning streams and in aid-

ing flood control when such improvements are deemed to be of aid of the county in the maintenance and the building of county roads, in counties having a population of from nineteen thousand, eight hundred and fifty (19,850) to nineteen thousand, eight hundred and ninety-five (19,895) according to the last Federal Census. Added Acts 1939, 46th Leg., Spec. L., p. 588, § 1.

17. a. The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is hereby empowered to create a revolving fund or funds and to make appropriations thereto out of the general revenue of such county; and such revolving fund shall be used by such county only in cooperation with the United States Department of Agriculture to aid and assist in carrying out the purposes and provisions of an Act of Congress of the United States pertaining to the distribution of commodities to persons in need of assistance, under the direction of the United States Department of Agriculture; provided, however, that the county shall have on hand at all times either the moneys appropriated to such revolving fund or funds or the equivalent thereof in stamps issued by the United States Department of Agriculture under the Food and/or Cotton Stamp Plan, which stamps are convertible into cash at any time.

b. In such counties of this State exercising the powers herein granted, an issuing officer shall be appointed to carry out the provisions of this Act and to administer the funds herein appropriated. Such issuing officer shall be a citizen of the State of Texas and appointed by the County Judge of such County subject to the approval of the Commissioners Court thereof. He shall be required to

furnish a good and sufficient surety bond in such amount and upon such terms and conditions as may be required by the Commissioners Court and the United States Department of Agriculture. Such issuing officer shall receive a salary, to be paid out of the general fund or any other fund of the county, except constitutional funds, not otherwise appropriated, not to exceed Two Hundred Dollars ($200) per month, and may appoint such cashiers and other assistants as may be authorized by such Court. The premiums of all bonds which may be required of such issuing officer, cashiers or other assistants, shall be paid by the Commissioners Court out of any available funds therefor belonging to such county.

c. Provided however the powers herein granted to such counties may be exercised by two (2) or more counties in conjunction with each other and in cooperation with the United States Department of Agriculture. And when such powers are exercised by two (2) or more counties jointly, the County Judges of such counties shall appoint the issuing officer, fix such appointee's bond and to do all other things necessary to cooperate with the United States Department of Agriculture in the same and like manner as is herein granted to any one county of this State.

d. Provided that such Commissioners Courts of such counties may cooperate with any incorporated city or town within such county or counties on such conditions and requirements as may be promulgated by such Commissioners Court or Courts.

e. Whenever any county herein authorized to create such a revolving fund ceases to participate therein the issuing officer appointed under the provisions hereof shall

forthwith reduce all stamps to their equivalent in money and return such moneys then on hand to the fund from which same was originally appropriated and render a full account of his administration thereof to the Commissioners Court or Courts as the case may be. Added Acts 1941, 47th Leg., p. 204, ch. 146, § 1.

18(a) The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is empowered in all cases where said county has heretofore acquired, or may hereafter acquire, land for an airport through purchase or gift from any person or source whatever, including the Federal Government, or any agency thereof, to lease said land and/or the facilities thereof, or any part thereof to any person or corporation upon such terms as the Commissioners Court shall deem advisable for airport purposes, or other purposes, provided any such lease is not inhibited by the terms of the grant to such county. Said counties through such Commissioners Courts are also hereby expressly authorized and empowered to contract with reference to oil, gas or other minerals or natural resources which may be vested in said counties by virtue of the ownership of such airports and to execute and deliver to any person upon such conditions and for such consideration, including oil payments, gas payments, overriding royalties, etc. as the Commissioners Court may deem advisable, mineral deeds or mineral leases of all or any part of said minerals, or the rights thereto, which are vested in the county and to generally contract for the exploration and development of the minerals underlying said land or any part thereof.

(b) The proceeds from the sale of any minerals or mineral rights, or the consideration for the execution of any

mineral leases, including cash bonuses, delay rentals and royalties, need not be devoted to the maintenance, upkeep, improvement and operation of such airport, but may be expended by the Commissioners Court for any lawful purpose.

(c) The proceeds received, or to be received from any person from the lease of the surface of said land, or from the lease of the facilities thereof, or any part thereof, for purposes other than airport purposes, or for purposes other than those relating to the operation of an airport, may likewise be expended by the Commissioners Court for any lawful purpose.

(d) The proceeds received, or to be received, from any person for any lease of the surface of said land, or for the lease of the facilities thereof, or any part thereof, for airport purposes, or for purposes related to the operation of an airport, shall be devoted, first, to the maintenance, upkeep, improvement and operation of such airport and the facilities, structures and improvements thereof, but any surplus remaining at the close of any fiscal year of operation may be expended by such Commissioners Court for any lawful purpose.

(e) The proceeds received, or to be received, from any charges for the use of said airport for airport purposes shall be devoted, first, to the maintenance, upkeep, improvement and operation of such airport and the facilities, structures and improvements thereof, but any surplus remaining at the close of the fiscal year of operation may be expended by the Commissioners Court for any lawful purpose. Added Acts 1949, 51st Leg., p. 503, ch. 276, § 1.

19(a) The Commissioners Court of each county of this State, in addition to the powers already conferred upon it by law, is expressly authorized and empowered to contract with the United States Government, or with any agency thereof, and particularly with the Federal Works Administrator, the Housing and Home Finance Administrator, and/or the National Housing Administrator, or their successor or successors, for the acquisition of any land, or interest in land, in such county, owned by the United States Government, or any agency thereof, and for the acquisition of any temporary housing on land which the United States Government, or any agency thereof, may own or control; and each such county in this State is authorized and empowered to acquire by purchase, gift or otherwise, any such land and any such housing from the United States Government, or any agency thereof, and to own and operate such land and housing.

(b) Each Commissioners Court in this State is authorized and empowered to adopt a resolution or order requesting the transfer to said county of any such land or housing, or interest therein, which the United States Government, or any agency thereof, is now, or may be hereafter, authorized to convey or transfer to such county, and each such county, through its Commissioners Court, is expressly authorized and empowered to bind itself to comply with any and all terms and conditions which the United States Government, or any agency thereof, may impose as a prerequisite to the transfer or conveyance of any of such land or housing, or either of them, or any interest therein; and any instrument or deed conveying to said county any such land or any such housing, or any interest therein, may contain any conditions and pro-

visions, covenants and warranties which may be prescribed by the United States Government, or any agency thereof, and agreed upon by said county acting through its Commissioners Court, provided that such terms and conditions are not inhibited by the Constitution of the State of Texas.

(c) For the purpose of purchasing or otherwise acquiring said lands or housing, or both, and improving, enlarging, extending or repairing the same, the Commissioners Court of any county may issue negotiable bonds of the county and levy taxes to provide for the interest and sinking funds of any such bonds so issued, the authority hereby given for the issuance of such bonds and the levying and collection of such taxes to be exercised in accordance with the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of Texas, 1925, as amended.

(d) Counties are expressly authorized and empowered to lease or rent any lands, housing, or facilities acquired by them pursuant to this Act and to establish and revise the rent or charges therefor; to arrange or contract for the furnishing by any person or agency, public or private, of services, or facilities for, or in connection with, any of such lands, housing or facilities, or the occupants thereof;

(e) Said counties are further authorized to sell and convey all or any part of the land or housing so acquired or to lease or exchange same; and said counties are further expressly authorized to execute oil, gas or mineral leases covering all or any part of said lands so acquired on such terms and conditions as may be deemed advisable by the Commissioners Court and for such consideration, including oil payments, gas payments, overriding royalties, etc. as may be deemed advisable; and such counties, through

their Commissioners Courts, are expressly authorized and empowered to execute conveyances of minerals or mineral rights, and to generally contract for the exploration and development of the minerals underlying said land, if any, or any part thereof. Added Acts 1949, 51st Leg., p. 501, ch. 275, § 1.

20. The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is authorized and empowered in all cases where such county has acquired a water supply from subterranean waters for county purposes, to sell, contract to sell and deliver any or all of such water which is not needed for county purposes to any public or municipal corporation, or political subdivision of this State, including any water control and improvement district, or fresh water supply district now created and existing, or which may hereafter be created under the laws of this State; any such water sold or contracted to be sold and delivered to any such public or municipal corporation or political subdivision of this State, may be used or re-sold for any lawful purpose; and said Commissioners Court shall have the right to fix and determine the rate or rates at which such water shall be sold to any such public or municipal corporation or political subdivision of this State, and to enter into contracts to sell and supply such water at such determined rate or rates for any term of years not exceeding forty (40); and all monies received by the county from the sale of such water shall be placed to the credit of the General Fund of the county and may be expended for general county purposes as now or hereafter permitted by law. Added Acts 1950, 51st Leg., 1st C.S., p. 87, ch. 24, § 1.

Art. 2351a—1. V.T.C.S.

Section 1. The Commissioners Court in all counties of this State shall be authorized to furnish fire protection and fire-fighting equipment to the citizens of such county residing outside the city limits of any incorporated city, town or village within the county and/or adjoining counties. The Commissioners Court shall have the authority to purchase fire trucks and other fire-fighting equipment by first advertising and receiving bids thereon, and is hereby authorized to issue time warrants of the county and to levy and collect taxes to pay the interest and principal thereon as provided by law. The Commissioners Court of any county of this State shall also have the authority to enter into contracts with any city, town or village within the county and/or adjoining counties, upon such terms and conditions as shall be agreed upon between the Commissioners Court and the governing body of such city, town or village, for the use of the fire trucks and other fire-fighting equipment of the city, town or village. It is specifically provided that the acts of any person or persons while fighting fires, traveling to or from fires, or in any manner furnishing fire protection to the citizens of a county outside the city limits of any city, town or village, shall be considered as the acts of agents of the county in all respects, notwithstanding such person or persons may be regular employees or firemen of a city, town or village. No city, town or village within a county and/or adjoining counties shall be held liable for the acts of any of its employees while engaged in fighting fires outside the city limits pursuant to any contract theretofore entered into between the Commissioners Court of the county and the governing body of the city, town or village. Acts 1941,

47th Leg., p. 567, ch. 360, § 1; Acts 1961, 57th Leg., p. 492, ch. 234, § 1.

Art. 2351f. V.T.C.S.

Section 1. Commissioners Courts of the counties of this State are hereby authorized to spend moneys in the general fund for the purpose of maintenance and upkeep of public cemeteries in their respective counties.

Sec. 2. If a part, section, subsection, paragraph, sentence, clause, phrase, or word contained in this Act shall be held by the courts to be unconstitutional or invalid, such holding shall not affect the validity of the remaining portions of this Act and the Legislature hereby declares that it would have enacted, and does here now enact, such remaining portion despite any such invalidity. Acts 1951, 52nd Leg., p. 437, ch. 271.

Art. 2351g—1. V.T.C.S.

Section 1. Commissioners Courts of the counties of the State of Texas, are hereby authorized on behalf of the counties, to acquire by easement or in fee simple, lands on which to locate public dumping and garbage disposal grounds, and to expend moneys out of the General Fund for the purpose of acquiring such easements or fee simple title, either by purchase or by condemnation.

Sec. 2. The location of such dumping or garbage disposal grounds, and the consideration to be paid therefor, shall be a matter committed to the sound discretion of the Commissioners Courts, taking into consideration the convenience of the people to be served, and the general health of, and the annoyance to, the community to be served by such dumping and garbage disposal grounds.

Sec. 3. Counties are hereby given the right of eminent domain in acquiring such grounds in accordance with the provisions of the eminent domain Statutes of the State of Texas; provided, however, that counties shall not have the right of eminent domain in acquiring such grounds as against corporations which also have the right of eminent domain by Statute.

Sec. 4. Chapter 464, Acts of the 54th Legislature, Regular Session, 1955 (codified as Article 2351g, Vernon's Texas Civil Statutes), is repealed. Acts 1965, 59th Leg., p. 1019, ch. 503.

Art. 2352. V.T.C.S.

Said court shall have the power to levy and collect a tax for county purposes, not to exceed twenty-five cents on the one hundred dollars valuation, and a tax not to exceed fifteen cents on the one hundred dollars valuation to supplement the jury fund of the county, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment to the Constitution, September 25, A.D. 1883, and for the erection of public buildings, streets, sewers, water works and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as in the Constitution otherwise provided. They may levy an additional tax for road purposes not to exceed fifteen cents on the one hundred dollar valuation of the property subject to taxation, under the limitations and in the manner provided for in Article 8, Sec. 9, of the Constitution and in pursuance of the laws relating thereto. Const. art. 8; sec. 9; Amendment 1899.

Art. 2352d. V.T.C.S.

Appropriation

Section 1. All counties in the State of Texas may appropriate from the General Fund of said counties an amount not exceeding Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation for the purpose of advertising and promoting the growth and development of such county; providing that before the Commissioners Court of any county may appropriate any sums for such purpose, the qualified taxpaying voters of said county shall, by a majority vote of the persons voting at such election, authorize the County Commissioners to thereafter appropriate not to exceed Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation.

Board of Development Fund; budget

Sec. 2. The amount of money approved by the Commissioners Court for the Board of Development shall constitute a separate fund to be known as the Board of Development Fund and shall not be used for any other purpose. Each claim against the Board of Development shall be authorized and approved by the Board of Development before presented for payment and after such approval, shall be presented to the Commissioners Court and acted upon as all other claims against the Commissioners Court.

The Board of Development hereinafter provided for shall annually in advance, prepare and submit to the Commissioners Court a budget for the ensuing year in the same manner as required of counties. The money appropriated annually shall be governed by the discretion of the Commissioners Court, but in no event shall said sum

Sec. 3. Counties are hereby given the right of eminent domain in acquiring such grounds in accordance with the provisions of the eminent domain Statutes of the State of Texas; provided, however, that counties shall not have the right of eminent domain in acquiring such grounds as against corporations which also have the right of eminent domain by Statute.

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Board of Development Fund; budget

Sec. 2. The amount of money approved by the Commissioners Court for the Board of Development shall constitute a separate fund to be known as the Board of Development Fund and shall not be used for any other purpose. Each claim against the Board of Development shall be authorized and approved by the Board of Development before presented for payment and after such approval, shall be presented to the Commissioners Court and acted upon as all other claims against the Commissioners Court.

The Board of Development hereinafter provided for shall annually in advance, prepare and submit to the Commissioners Court a budget for the ensuing year in the same manner as required of counties. The money appropriated annually shall be governed by the discretion of the Commissioners Court, but in no event shall said sum

may, when necessary, provide buildings, rooms, or apartments at the county seat, other than the courthouse, for holding the sessions of the County Courts, District Courts, and for carrying on such other public business as may be authorized by the Commissioners Court, and may lease or rent such part of any such buildings, rooms, or apartments as may not be necessary for public use. Acts 1941, 47th Leg., p. 643, ch. 388.

Art. 2372d—2. V.T.C.S.

Section 1. The Commissioners Court of any county is hereby authorized to purchase, build, or construct buildings and other permanent improvements to be used for annual exhibits of horticultural and agricultural products, and/or livestock and mineral products of the county, and for a coliseum and auditorium. Such building or buildings and other permanent improvements may be located in the county at such place or places as the Commissioners Court may determine. Payment for such building or buildings and other permanent improvements shall be made from the Constitutional Permanent Improvement Fund. As amended Acts 1959, 56th Leg., 3rd C.S., p. 380, ch. 5, § 1.

ELECTION CODE

Art. 2.04.

(a) Each county shall be divided into convenient election precincts by the Commissioners Court of the county, of which precincts shall be differently numbered and described by natural or artificial boundaries or survey lines by an order entered upon the minutes of the Court. At any July or August term, the Court may make such

changes in the election precincts as they deem proper, by such order entered upon the minutes of the Court. When such an order is entered, they shall immediately thereafter publish in some newspaper in the county for three consecutive weeks a notice of the entry of such order, giving a brief description in general terms of the changes made, without the necessity of including in such notice the field notes or other detailed description of the precinct boundaries. If there be no newspaper in the county, then a copy of such order shall be posted in some public place in each election precinct in the county which is affected by the order.

(b) No election precinct shall be formed out of two or more justice precincts or commissioners precincts, nor out of the parts of two or more justice precincts or commissioners precincts; and no election precinct shall be formed out of two or more Congressional Districts or State Senatorial Districts or State Representative Districts, nor out of the parts of two or more such Districts. If in September of any year there exists any election precinct in the county which does not comply with the foregoing requirements, the Commissioners Court shall make the necessary changes before the first day of October, either at a regular meeting or at a special meeting called for that purpose; and the order shall be published as provided in Paragraph (a) of this Section. No election precinct shall have resident therein more than two thousand voters as ascertained by the current certified lists of qualified voters; provided, however, that in precincts in which voting machines have been adopted for use, the maximum number of voters shall be three thousand.

(c) In cities and towns having ten thousand or more inhabitants, each ward shall constitute an election precinct

unless there shall reside in said ward more than two thousand qualified voters. In such cities and towns, no precinct shall be made out of parts of two wards; and no precinct shall include territory outside the corporate limits of the city or town unless the Commissioners Court finds that adjacent unincorporated territory is so situated that it cannot be formed into or included within an election precinct wholly outside the city, of suitable size and shape and containing a suitable number of voters. If the Commissioners Court finds this condition to exist, it may include such territory in a precinct or precincts formed *within the city* or town, and the finding of the Commissioners Court shall be conclusive.

(d) In cities, towns and villages of less than ten thousand inhabitants, election precincts may be formed without regard to the wards or the corporate limits of the city, town or village.

(e) Changes in election precincts shall not become operate in the holding of elections until the beginning of the following voting year. The Commissioners Court shall cause to be made out and delivered to the County Tax Collector before the first day of each September a certified copy of such last order for the year following; provided, however, that any order entered during the month of September, as provided in Paragraph (b) of this Section, shall be delivered to the Tax Collector forthwith. As amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 7; Acts 1965. 59th Leg., p. 1552, ch. 678, § 1, emerg. eff. June 18, 1965.

Art. 3.01.

(a) For county elections. The commissioners court at its February term shall appoint from among the citizens

of each election precinct one qualified voter as presiding judge of elections held at the expense of the county in that precinct and one qualified voter as alternate presiding judge, each of whom shall continue to act until his successor is appointed. Whenever a vacancy arises in either of such offices, the commissioners court may fill the vacancy at any regular or special term of court. All orders appointing judges and alternates shall be entered of record. Each presiding judge shall appoint two qualified voters, who are residents of the precinct, to serve as election clerks, and shall appoint for each election as many additional clerks as he deems necessary for the proper conduct of the election, not to exceed the maximum number authorized by the commissioners court. The commissioners court shall fix the maximum number of clerks which may be appointed for each precinct, and may fix different maximums depending on the type of election. The clerks shall be selected from different political parties, when practicable. As amended Acts 1965, 59th Leg., p. 1552, ch. 678, § 2.

Art. 3264a. V.T.C.S.

The right of Eminent Domain is hereby conferred upon counties of the State of Texas for the purpose of condemning and acquiring land, right of way or easement in land, private or public, except property used for cemetery purposes, where said land, right of way or easement is necessary in the construction of jails, courthouses, hospitals, delinquent and dependent schools, poor farms, libraries or for other public purposes, where such purpose is now or may hereafter be authorized by the Constitution or Statutes of this State.

All such condemnation proceedings shall be instituted under the direction of the commissioners' court, and in the name of the county, and the assessing of damages shall be in conformity to the Statutes of the State of Texas for condemning and acquiring right of way by railroads. That no appeal from the finding and assessment of damages by the commissioners appointed for that purpose shall have the effect of causing the suspension of work by the county in connection with which the land, right of way, easement, etc., is sought to be acquired. In case of appeal, counties shall not be required to give bond, nor shall they be required to give bonds for costs. Acts 1925, p. 300. Acts 39th Leg., ch. 116, § 1.

Art. 4436a—1. V.T.C.S.

Cooperation by Commissioners Court and City Council

Section 1. In any county containing an incorporated city the Commissioners Court and the city council of such county and city by a suitable order of each of said bodies duly entered on the minutes of the Commissioners Court and city council may co-operate in forming a City-County Health Unit and combine health units of each political subdivision for such purpose and appropriate such funds by each of said governing bodies as may be agreed upon by the two said governing bodies to the combined health unit in such proportion as may be agreed upon between said Commissioners Court and said city council . . . . As amended Acts 1957, 55th Leg., p. 186, ch. 84.

Art. 4478. V.T.C.S.

The commissioners court of any county shall have power to establish a county hospital and to enlarge any exist-

ing hospitals for the care and treatment of persons suffering from any illness, disease or injury, subject to the provisions of this chapter. At intervals of not less than twelve months, ten per cent of the qualified property tax paying voters of a county may petition such court to provide for the establishing or enlarging of a county hospital, in which event said court within the time designated in such petition shall submit to such voters at a special or regular election the proposition of issuing bonds in such aggregate amount as may be designated in said petition for the establishing or enlarging of such hospital. Whenever any such proposition shall receive a majority of the votes of the qualified property tax payers voting at such election, said commissioners court shall establish and maintain such hospital and shall have the following powers:

1. To purchase and lease real property therefor, or acquire such real property, and easements therein, by condemnation proceedings.

2. To purchase or erect all necessary buildings, make all necessary improvements and repairs and alter any existing buildings, for the use of said hospital. The plans for such erection, alteration, or repair shall first be approved by the State Health Officer, if his approval is requested by the said commissioners court.

3. To cause to be assessed, levied and collected, such taxes upon the real and personal property owned in the county as it shall deem necessary to provide the funds for the maintenance thereof, and for all other necessary expenditures therefor.

4. To issue county bonds to provide funds for the establishing, enlarging and equipping of said hospital and

for all other necessary permanent improvements in connection therewith; to do all other things that may be required by law in order to render said bonds valid.

5. To appoint a board of managers for said hospital.

6. To accept and hold in trust for the county, any grant or devise of land, or any gift or bequest of money or other personal property or any donation to be applied, principal or income or both, for the benefit of said hospital, and apply the same in accordance with the terms of the gift. Acts 1913, p. 71.

Art. 4492. V.T.C.S.

Section 1. Any Commissioners Court may cooperate with and join the proper authorities of any city having a population of ten thousand (10,000) persons or more in the establishment, building, equipment and maintenance of a hospital in said city, and to appropriate such funds as may be determined by said Court, after joint conference with the authorities of such city or town, and the management of such hospital shall be under the joint control of such Court and city authorities.

Sec. 2. Any Commissioners Court may cooperate with and join the proper authorities of any two (2) or more cities in the establishment, building, equipment and maintenance of a hospital in said county, and to appropriate such funds as may be determined by said Court, after a joint conference with the authorities of such cities or towns, and the management of such hospital shall be under the joint control of such Court and city authorities. Acts 1913, p. 71; Acts 1953, 53rd Leg., p. 526, ch. 190, § 1.

Art. 6081f. V.T.C.S.

Section 1. All counties and all incorporated cities, towns, and villages of this State shall be authorized to operate and maintain parks.

Sec. 2. All counties and all incorporated cities, towns, and villages of this State shall be authorized to acquire or improve, or both, land for park purposes and to issue negotiable bonds therefor, and to assess, levy, and collect ad valorem taxes to pay the principal of and interest on such bonds, the authority hereby given for the issuance of such bonds and levy of such taxes to be exercised in accordance with and subject to the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of Texas of 1925, as amended.

Sec. 3. There shall be no limitation on the amount of ad valorem taxes, or the assessment, levy, and collection thereof, to pay park operation and maintenance expenses, or to pay the principal of and interest on such park bonds, except for those ad valorem tax limitations imposed by the provisions of the Constitution of the State of Texas.

Sec. 4. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict; and specifically, all ad valorem tax limitations for any park or park bond purposes contained in any laws of the State of Texas, including Article 6080 of the Revised Civil Statutes of Texas of 1925; Chapter 120, Acts of the 41st Legislature, Regular Session, 1929 (compiled as Article 6081b of Vernon's Texas Civil Statutes); Chapter 70, Acts of the 42nd Legislature, Regular Session, 1931 (compiled as Article 6081d of Vernon's Texas Civil Statutes); Chapter 227, Acts of the 58th Legislature, Regular Session,

1963 (compiled as Article 6081e of Vernon's Texas Civil Statutes); and Chapter 7, Acts of the 47th Legislature, Regular Session, 1941 (compiled as Article 6081g, of Vernon's Texas Civil Statutes) are hereby repealed and shall be of no further force or effect, but the remainder of such laws shall remain in full force and effect. Acts 1965, 59th Leg., p. 996, ch. 483.

Art. 6626. V.T.C.S.

The following instruments of writing which shall have been acknowledged or proved according to law, are authorized to be recorded, viz.: all deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands or tenements, or goods and chattels, or moveable property of any description; provided, however, that in cases of subdivision or re-subdivision of real property no map or plat of any such subdivision or re-subdivision shall be filed or recorded unless and until the same has been authorized by the Commissioners Court of the county in which the real estate is situated by order duly entered in the minutes of said Court, except in cases of the partition or other subdivision through a court of record; provided that where the real estate is situated within the corporate limits or within five miles of the corporate limits of any incorporated city or town, the governing body thereof or the city planning commission, as the case may be, as provided in Article 974a, Vernon's Texas Civil Statutes, shall perform the duties hereinabove imposed upon the Commissioners Court. Acts 1846, p. 236; P.D. 5004; G.L. vol. 2, p. 1542; Acts 1931, 42nd Leg., p. 371, ch. 217, § 1; Acts 1951, 52nd Leg., p. 745, ch. 403, § 1.

Art. 6701d. V.T.C.S.

Sec. 169. (a) The County Commissioners Court of any county with respect to county highways or roads outside the limits of the right-of-way of any officially designated or marked highway, road or street of the State Highway System and outside the limits of any incorporated city, town or village shall have the same authority by order of the County Commissioners Court entered upon its records to alter maximum prima facie speed limits upon the basis of an engineering and traffic investigation as that delegated to the State Highway Commission with respect to any officially designated or marked highway, road or street of the State Highway System; provided that under no circumstances shall any County Commissioners Court have the authority to modify or alter the basic rule established in paragraph (a) of Section 166 nor to establish a speed limit higher than sixty (60) miles per hour. Acts 1963, 58th Leg., p. 455, ch. 161, § 1.

Art. 7345d. V.T.C.S.

In all cases where property appearing on the tax rolls, whether rendered or unrendered, current or delinquent, appears to have been assessed at a valuation greater than that placed upon other property in such locality of similar value, or out of proportion to the taxable value of such property; or where by reason of the depreciation in the value of such property an adjustment of assessed value would be equitable and expedient; or where by reason of long delinquency, the accumulated delinquent taxes, with penalties, interest, and cost aggregate such amount as to make their collection inequitable or confiscatory, the Commissioners Court of the county in which such property is situated, upon the application of the owner thereof

or his duly authorized agent, shall have the power to reopen and reconsider the original assessments. In all such cases, the Commissioners Court shall hear testimony from competent and disinterested witnesses, and may make such personal and independent investigation as may seem necessary and expedient. If, after such investigation it shall appear to the Commissioners Court that such assessments were discriminatory, or out of proportion to the taxable value of the property, or that by reason of the depreciation of value of same, or that the enforced collection of the accumulated delinquent taxes, penalties, interest, and costs would be inequitable or confiscatory, the Commissioners Court may, under its power as a Board of Equalization, make such adjustments as to assessed values of such property as it may determine to be equitable and just. And any previous fixing of values of such property for the years involved shall not be "res adjudicata" as to the particular case.

Provided, that the State Comptroller shall be furnished with a certified copy of any order passed in pursuance hereof, as shall likewise the County Assessor-Collector of Taxes, who shall make the necessary correction of his rolls. Provided further, that nothing herein shall be construed as authorizing the Commissioners Court to remit any penalty, interest, or costs that have accrued, but all such penalty, interest, and costs shall be collected on the adjusted assessment as may be authorized by existing law. Added Acts 1939, 46th Leg., p. 659, § 1.

ORDERS OF THE COMMISSIONERS COURT OF MIDLAND COUNTY

BE IT REMEMBERED THAT ON THE 31st DAY OF AUGUST A.D. 1963 AT 10:00 A.M. THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

ALVEY BRYANT, JUDGE PRO TEM
CLARK MORELAND, Commissioner Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

Due to the absence of Judge Culver and Commissioner Gideon, Motion was made by Commissioner Moreland, seconded by Commissioner Osborne, and all voting in favor to adjourn until 2:30 P.M. and hope Judge Culver and Commissioner Gideon would be able to attend the meeting.

/s/ Barbara G. Culver, Judge Pro Tem

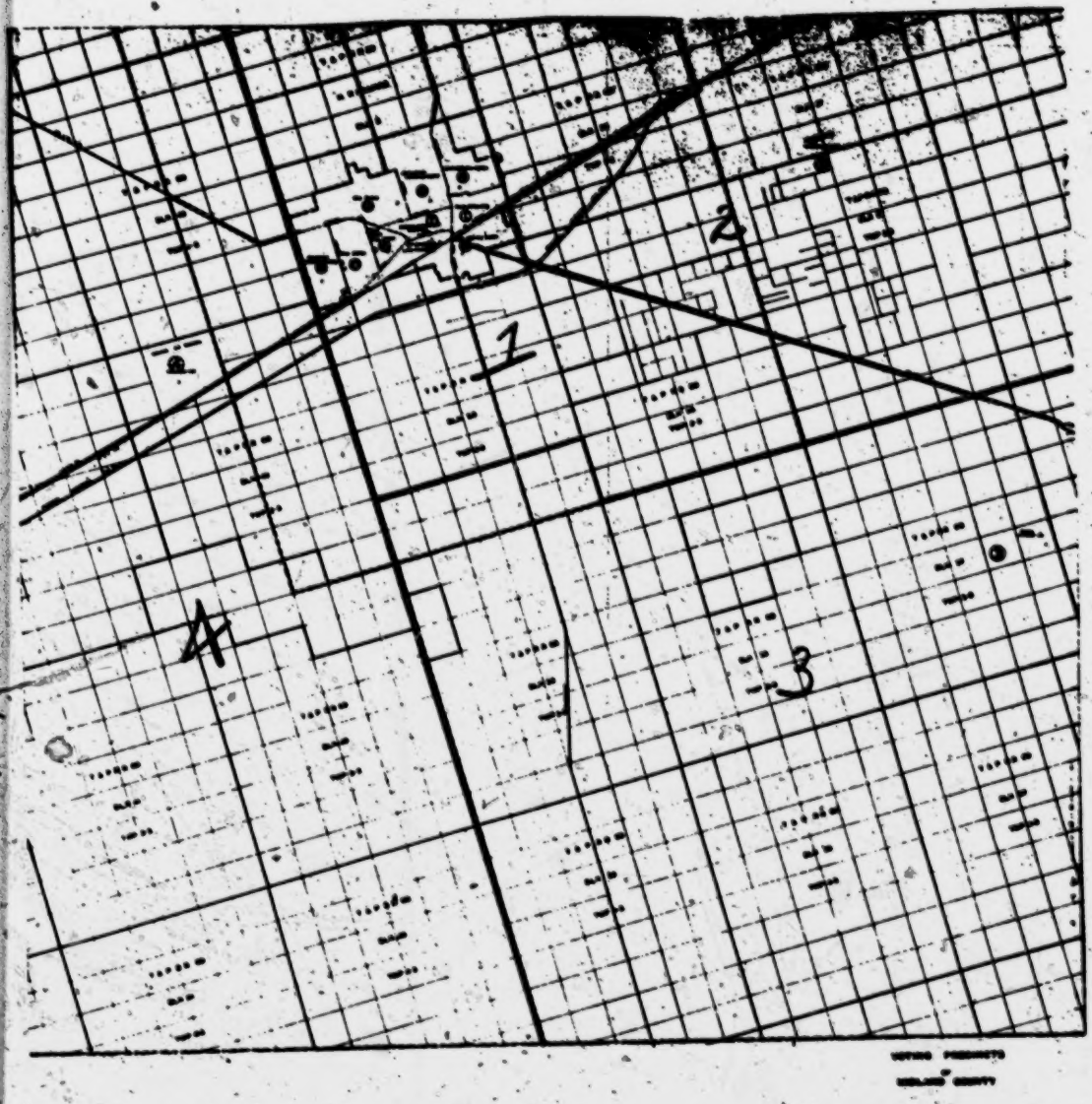
The Commissioners' Court reconvened with the following members present:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

Commissioner Osborne submitted the following plan for redistricting Commissioners Precincts in Midland County.

1
2
3
4

Commissioner Bryant submitted his plan for re-districting Commissioners Precincts in Midland County, said plan being as follows:



After discussing both plans presented, Motion was made by Commissioner Osborne, seconded by Commissioner Moreland and all Commissioners voting in favor to adopt the plan presented by Commissioner Osborne on re-districting Commissioners Precincts in Midland County. A map of this plan appears on page 246 of these minutes.

After changing the Commissioners Precinct boundary lines it was necessary to amend the voting precincts for 1964. Motion was made by Commissioner Gideon, seconded by Commissioner Bryant, and all voting in favor to amend these voting precincts as follows:

All residents South of the Garden City highway, in Commissioners Precinct No. 2 shall be in voting precinct No. 16.

All residents North of the Garden City Highway and in Commissioners Precinct No. 2 shall be in voting precinct No. 2.

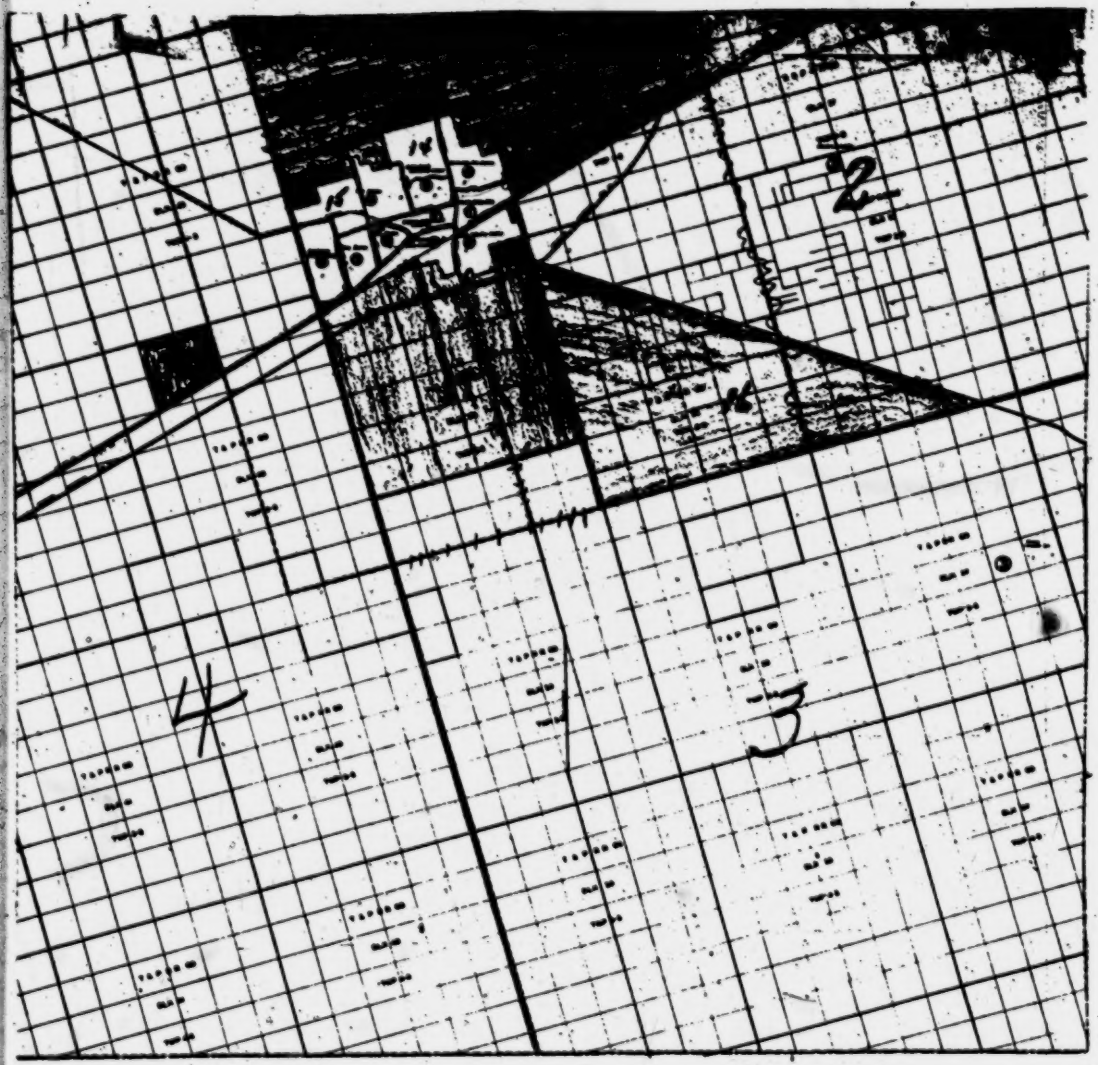
All residents South of the railroad track, outside the City Limits and in Commissioners Precinct No. 1 shall be in voting precinct No. 17.

All residents North of the Railroad track, outside the City Limits and in Commissioners Precinct No. 1 shall be in voting precinct No. 18.

All residents within the City Limits of Terminal and in Commissioners Precinct No. 4 will be in voting precinct No. 19.

All residents outside the City Limits of Terminal and in Commissioners Precinct No. 4 shall be in voting precinct No. 4.

All boundaries of Commissioners Precincts and Voting Precincts shall become effective January 1, 1964.



There being no further business to come before the court the meeting was adjourned after the foregoing minutes were read and approved.

ATTEST: /s/ Rosenelle Cherry, County Clerk

/s/ Barbara G. Culver, County Judge

THE STATE OF TEXAS §
COUNTY OF MIDLAND §

I, Rosenelle Cherry, County Clerk and ExOfficio Clerk of the Commissioners' Court of Midland County, Texas, do herby certify that the attached and foregoing is a true and correct copy of the minutes of a meeting of said Commissioners' Court held on the 31st day of August, 1963, including an Order establishing County Commissioners' Precincts and an Order amending the boundaries of certain County Election Precincts adopted by said Commissioners' Court on such day, as same appear of record in Volume 8, Page(s) 245 thru 248, of the official minutes of said Commissioners' Court on file in my office.

WITNESS MY HAND AND THE OFFICIAL SEAL OF SAID COMMISSIONERS' COURT this 12th day of May, 1964.

(Seal)

ROSENELLE CHERRY
Rosenelle Cherry
County Clerk and Ex-Officio Clerk
of the Commissioners' Court of
Midland County, Texas

BE IT REMEMBERED THAT ON THIS THE 7th DAY OF JANUARY A.D. 1964 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT, THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY A. BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

The first business to come before the court was the reading of the minutes of the meeting held on January 2, 1964 and they were read and approved with the exception of describing the Commissioners Precincts by metes and bounds to correspond with the plat previously adopted at a meeting held on August 31, 1963. Motion by Commissioner Gideon, seconded by Commissioner Bryant, and all four commissioners voting in favor to adopt the following metes and bounds descriptions of Commissioners Precinct boundary lines in Midland County:

Precinct 1

Beginning at a point on the North boundary line of Midland County just North of Section 1, Block 40, Twp 1-South, T & P Rwy. Co. Survey and the point just north of Section 6, Block X, H.P. Hilliard Survey proceeding on this Section line in a Southeasterly direction to the point separating Section 36 & 37 of Block 40 Twp 2-South, and Section 31 & 42, Blk. 39 Township 2-South, T & P Railway Co. Survey. Proceeding on this Section line in an easterly direction to the Section line between Sections 36 & 37 of Block 39, Township 2-South, T & P Rwy. Co. Survey and Sections 24 & 25, Block 38, Twp 2-South, T & P Rwy. Co. Survey. Proceeding on this section line north to Highway 80 thence easterly along Highway 80 to the point on the Section line between

Section 36, Block 38, Twp 1-South, and Section 31, Block 37 Township 1-South, T & P Railway Co. Survey, Thence North on this Section line to the North boundary line of Midland County. Thence West along the North Boundary line of Midland County to the place of beginning.

Precinct 2

Beginning at that point on the North boundary line of Midland County between Section 24, Block 38, Twp 1-South, T & P Railway Co. Survey and Section 19, Block 37, Twp 1-South, T & P Railway Co. Survey. Thence East along the North boundary line of Midland County to the Northeast corner of the County line; Thence South along the eastern boundary line of Midland County to the point between Section 44, Block 36, Twp 2-South, T & P Railway Co. Survey and Section 5, Block 36, Twp. 3-South, T & P Railway Co. Survey. Thence along this Section line in a westerly direction to the point dividing Section 36, Block 38, Twp 2-South, T & P Railway Co. Survey and Section 48, Block 39, Twp 2-South, T & P Railway Co. Survey; Thence North along this Section line to Highway 80; Thence East along Highway 80 to the point between Sec. 31, Blk 37, Twp 1-South and Sec. 36, Blk. 38, Twp 1-South, T & P Railway Co. Survey; Thence North to the North Boundary line of Midland County and the point of beginning.

Precinct 3

Beginning at the East boundary line of Midland County at a point between Sec. 4, Blk. 36, Twp 3-South, T & P Railway Co. Survey and Sec. 5, Blk. 36, Twp 3-South, T & P Railway Co. Survey proceeding along the East boundary line of Midland County South to the Southeast corner

of Midland County; Thence West along the South boundary line of Midland County to the point between Section 37, Block 40, Twp 4-South, T & P Railway Company Survey and Section 42, Block 39, Twp 4-South, T & P Railway Co. Survey; Thence North along this Section line to the point between Section 37, Block 40, Twp. 2-South and Section 42, Block 39, Twp. 2-South, T & P Railway Co. Survey; Thence East along this Section line to the point between Sec. 37, Blk. 39, Twp 2-South and Sec. 25, Blk. 38, Twp 2-South, T & P Railway Co. Survey. Thence South along this Section line to the point between Section 1, Blk. 39, Twp. 3-South, T & P Railway Co. Survey and Sec. 6, Blk. 38, Twp 3-South, T & P Railway Co. Survey; Thence East along this Section line to the East boundary line of Midland County and its point of beginning.

Precinct 4

Beginning at the point just north of Section 6, Blk.X, H. P. Hilliard Survey and Sec. 1, Blk. 40, Twp 1-South, T & P Railway Company Survey on the North boundary line of Midland County, proceeding West to the Northwest corner of Midland County along the North boundary line of Midland County; thence South along the Western boundary line of Midland County to the Southwest corner of Midland County; Thence East along the South boundary line of Midland County to the point on the Section line between Sec. 37, Block 40, Twp 4-South, T & P Railway Company Survey and Section 42, Block 39, Twp 4-South, T & P Railway Co. Survey; Thence North along this Section line to the North boundary line of Midland County and its point of beginning.

There being no further business to come before the court the meeting was adjourned.

ATTEST: /s/ Rosenelle Cherry, County Clerk

/s/ Barbara G. Culver, County Judge

THE STATE OF TEXAS §
COUNTY OF MIDLAND §

I, Rosenelle Cherry, County Clerk and Ex-Officio Clerk of the Commissioners' Court of Midland County, Texas, do hereby certify that the attached and foregoing is a true and correct copy of an Order adopted by said Commissioners' Court at a meeting held on the 7 day of January, 1964, as same appears of record in Volume 8, Page (s) 259-260, of the official minutes of said Commissioners' Court on file in my office, together with excerpts from said minutes showing those present at said meeting and the approval of the minutes of said meeting.

WITNESS MY HAND AND THE OFFICIAL SEAL OF SAID COMMISSIONERS' COURT this 12 day of May. 1964.

ROSENELLE CHERRY
Rosenelle Cherry,

(Seal)

County Clerk and ExOfficio Clerk
of the Commissioners' Court of
Midland County, Texas

SUPREME COURT, U. S.

OCT 11 196

JOHN F. DAVIS, CLE

No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1967

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

RALPH S. SPRITZER,
Acting Solicitor General,
JOHN DOAR,
Assistant Attorney General,
FRANCIS X. BEYTAGH, Jr.,
Assistant to the Solicitor General,
ALEC P. BOUXSEIN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Question presented	2
Interest of the United States	3
Statement	3
Introduction and summary	16
Argument:	
I. This Court's jurisdiction is properly invoked to review the federal constitutional question whether the equal-population principle is applicable to the Midland County Commisioners Court	20
II. None of the local government cases decided last Term resolve the constitutional question here at issue	27
III. No distinction should be made on functional lines in regard to the applicability of the equal-population principle at the local level	41
IV. Whatever distinctions might be drawn as to applicability of the equal-population principle at the local level, that principle should control the election of the county governing board here involved	58
Conclusion	73

CITATIONS

Cases:	
Allied Stores of Ohio v. *Bowers*, 358 U.S. 522	52
Armentrout v. *Schooler*, 409 S.W. 2d 138	42
Baker v. *Carr*, 369 U.S. 186	3, 14, 43, 44, 72
Bianchi v. *Griffing*, No. 591, this Term	27, 28, 71
Blaikie v. *Power*, 193 N.E. 2d 55, appeal dismissed, 375 U.S. 439	72
Blaikie v. *Wagner*, 258 F. Supp. 364	39

278-180—67——1

Cases—Continued

	Page
Board of Supervisors of Suffolk County v. *Bianchi*, 387 U.S. 97	3, 16
Brady v. *Maryland*, 373 U.S. 83	25
Brown v. *Board of Education*, 347 U.S. 483	57
Buchanan v. *Rhodes*, 249 F. Supp. 860, appeal dismissed, 385 U.S. 3	40
Carrington v. *Rash*, 380 U.S. 89	52
Cole v. *Violette*, 319 U.S. 581	25
Davis v. *Mann*, 377 U.S. 678	24, 63
Davis v. *Thomas County, Georgia*, No. 23,882 (C.A.5.)	35, 39
Delozier v. *Tyrone Area School Board*, 247 F. Supp. 30	42, 47, 69
Department of Banking v. *Pink*, 317 U.S. 264	25
Detroit Edison Co. v. *East China Twp. School District No. 3*, No. 543, this Term	41
Dusch v. *Davis*, 387 U.S. 112	3, 16, 17, 28, 31, 32, 34, 35, 36, 37, 39, 63, 71
Ehlinger v. *Clark*, 8 S.W. 2d 666	7
El Paso County v. *Elam*, 106 S.W. 2d 393	7
Ellis v. *Mayor and City Council of Baltimore*, 352 F. 2d 123	21
Ferguson v. *Ferguson*, 338 S.W. 2d 945	25
First State Bank of Bishop v. *Grebe*, 162 S.W. 2d 165	23
Fortson v. *Dorsey*, 379 U.S. 433	32, 33
Fortson v. *Morris*, 385 U.S. 231	31, 32, 34
Gotthilf v. *Sills*, 375 U.S. 79	25
Gray v. *Sanders*, 372 U.S. 368	28, 43, 44, 47
Hanlon v. *Towey*, 142 N.W. 2d 741	42, 66
Hargrove v. *Insurance Investment Corp.*, 176 S.W. 2d 744	25
Harper v. *Virginia Board of Elections*, 383 U.S. 663	53
Iannucci v. *Board of Supervisors of Washington County*, 20 N.Y. 2d 244	40
Jankovich v. *Toll Road Comm'n*, 379 U.S. 487	20
Market Street Ry. Co. v. *Railroad Commission*, 324 U.S. 548	25
Martinolich v. *Dean*, 256 F. Supp. 612	36
Maryland Committee for Fair Representation v. *Tawes*, 377 U.S. 656	63

Cases—Continued

	Page
McLaughlin v. *Florida*, 379 U.S. 184	52
McMillan v. *Wagner*, 21 C.D.L.A. 101	42, 47
Mills v. *Alabama*, 384 U.S. 214	25
Moody v. *Flowers*, 256 F. Supp. 195	67
Moody v. *Flowers*, 387 U.S. 97	3, 16, 27, 28, 55, 67, 68, 71
Morey v. *Doud*, 354 U.S. 457	52
Myles Salt Co. v. *Board of Comm'rs of Iberia & St. Mary Drainage District*, 239 U.S. 478	54
New York State Ass'n of Trial Lawyers v. *Rockefeller*, 267 F. Supp. 148	40
People ex rel. Engle v. *Kerner*, 205 N.E. 2d 33	72
Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 979	25
Pritchard & Abbott v. *McKenna*, 350 S.W. 2d 333	7
Railroad Commissioner v. *Weld*, 66 S.W. 1095	25
Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62	25
Reynolds v. *Sims*, 377 U.S. 533	*in passim*
Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69	25
Rodgers v. *Taylor County*, 368 S.W. 2d 794	7
Saylors v. *Board of Education of the County of Kent*, 387 U.S. 105	3, 16, 28, 29, 30, 31, 32, 41, 44, 68, 71
Scott v. *Germano*, 381 U.S. 407	72
Seaman v. *Fedourich*, 209 N.E. 2d 778	40, 42
Seydler v. *Keuper*, 133 S.W. 2d 189	23
Shanker v. *Regents of the University*, 19 N.Y. 2d 951, affirming 27 App. Div. 2d 84	40
Skolnick v. *Kerner*, 387 U.S. 91	40
Spencer v. *Pettit*, 34 S.W. 2d 798	24
State ex rel. Sonneborn v. *Sylvester*, 132 N.W. 2d 249	42
State of Indiana v. *County of Lake*, 27 C.D.L.A. 1	40
Strickland v. *Burns*, 256 F. Supp. 824	42, 46, 47, 69
Tedesco v. *Board of Supervisors of Elections for the Parish of Orleans*, 43 So. 2d 514, appeal dismissed, 339 U.S. 340	61
Thomas v. *Kansas City So. Ry. Co.*, 261 U.S. 481	54
Wells v. *Littlefield*, 62 Tex. 28	23
Wesberry v. *Sanders*, 376 U.S. 1	28, 42, 43, 44
Williamson v. *Lee Optical Co.*, 348 U.S. 483	52
Witherspoon v. *Daviss*, 163 S.W. 700	23

Constitutional provisions, statutes and rule:
United States Constitution, statutes and rules: Page
Fourteenth Amendment, Section 1 ..... 2, 13
28 U.S.C. 1257 ..... 20, 25, 26
28 U.S.C. 1257(2) 2
Arizona Revised Statutes Annotated:
Section 45–1207 53
Section 45–1209 54
Section 45–1517 54
Section 45–1612 54
Mississippi Code Annotated, Section 2870 36
Texas Constitution:
Article I, Section 3 15
Article V, Section 8 14
Article V, Section 18 ..... 2, 3, 4, 6, 13, 15
Article VII, Section 6 5
Article VIII, Section 18 ..... 5, 6, 7
Vernon's Annotated Civil Statutes of Texas:
Articles:
689a–11 5
695a 5
718 5
719 5
1015c 5
1269k, Section 23a 5
1666 5
1677 5
2339 ..... 4, 5, 6
2351 5
2352 5
2354 5
2355 5
2356 5
2370 5
2688 5
2766 6
3264a 6
4418f 5
4423 5
4436a 5
4478 5

Vernon's Annotated Civil Statutes of Texas—Continued
Articles—Continued Page
4492 5
6078 5
6081f 5
6743 5
7345d 5
Election Code, Articles:
2.01 5
2.04 5
3.01 5
Texas Rules of Civil Procedure, Rule 503 23
Miscellaneous:
Bollens, *Special District Governments in the United States* 55
Comment, 11 Tex. L. Rev. 518 3
Davis, *The Implications of Baker* v. *Carr on the County Commissioners Court of Texas*, 17 Baylor L. Rev. 41 59
Dyk, *Supreme Court of Review of Interocutory State-Court Decisions: "The Twilight Zone of Finality,"* 19 Stan. L. Rev. 907 26
Final Report of the Commission on Intergovernmental Relations, H. Doc. No. 198, 84th Cong., 1st Sess. 66
2 McQuillin, *Municipal Corporations:*
Section 10.06 46
Section 10.30 48
Section 10.32 50
Section 10.33 50
Section 10.34 48
Section 10.40 46, 50
Section 10.40a 46
Section 10.41 50
5 McQuillin, *Municipal Corporations*, Section 15.01–15.26 48
Note, *Reapportionment*, 79 Harv. L. Rev. 1228 38, 66
Note, 11 S. Dak. L. Rev. 386 66
Note, 20 Vand. L. Rev. 649 47
Note, 53 Va. L. Rev. 953 46
Oden & Meek, *County Reapportionment: A Rebuttal*, 18 Baylor L. Rev. 15 59

Rhyne, *Municipal Law:*
Page
Section 4–6 46
Section 5–2 46
U.S. Advisory Commission on Intergovernmental Relations, Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas (1962) 39
Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 ..... 38, 46, 66

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 39

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Texas (R. 141) are reported at 406 S.W. 2d 422. The opinion of the Texas Court of Civil Appeals (R. 134) is reported at 397 S.W. 2d 919. The prior findings and judgment of the Midland County District Court (R. 130) are unreported.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on July 13, 1966. Petitioner's timely motion for rehearing was overruled without written opinion on October 12, 1966. The petition for writ of certiorari was filed on January 10, 1967, and was granted

on June 12, 1967 (388 U.S. 905). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Article V, Section 18, and Article VIII, Section 18, of the Texas Constitution, along with other State constitutional provisions of less immediate relevance, are set out in the Appendix to petitioner's brief (pp. 2–6). Similarly, the relevant provisions of various articles of Vernon's Annotated Civil Statutes of Texas are contained in the Appendix to petitioner's brief (pp. 6–41), and thus are not reproduced in the instant brief.[2]

QUESTION PRESENTED

Whether the equal-population principle enunciated in *Reynolds* v. *Sims,* 377 U.S. 533, and other cases involving State legislative apportionment, is applicable as well to the district-based election of members of the

[1] Arguably, this Court's appellate jurisdiction could also have been invoked under 28 U.S.C. 1257(2)—although it might be questioned whether the validity of a State statute was drawn into question in the proceedings below.

[2] Those statutory provisions set out in the Appendix to petitioner's brief comprise the basic legislation relating to the powers, duties and functions of Commissioners Courts in Texas. Additional provisions, not as directly pertinent, are referred to at various points in the instant brief.

governing bodies of local units of government, such as the county here involved.

INTEREST OF THE UNITED STATES

At the last Term, the United States participated as *amicus curiae* in four cases involving the applicability of the equal-population principle to local units of government. *Sailors* v. *Board of Education of the County of Kent,* 387 U.S. 105; *Moody* v. *Flowers* (together with *Board of Supervisors of Suffolk County* v. *Bianchi*), 387 U.S. 97, and *Dusch* v. *Davis,* 387 U.S. 112. That, in turn, was consistent with the government's earlier role in cases such as *Baker* v. *Carr,* 369 U.S. 186, and *Reynolds* v. *Sims,* 377 U.S. 533, and was prompted by the importance of the fundamental right involved—the right of each citizen to full and fair participation in government, at all levels, on an equal basis. Because the basic constitutional question was not resolved by the decisions of last Term and is raised again in the instant case, we continue to assert the public interest—and that of millions of American citizens—in fair representation at the local governmental level.

STATEMENT

The governing body for Texas counties is called the Commissioners Court.[3] That body, in each Texas

[3] As pointed out by the Texas Supreme Court in its opinion in the instant case (R. 145), the name "Commissioners Court" is "a misnomer in the accepted meaning of the designation," and is but a remnant of historical development, since such bodies, as currently constituted, have no duties commonly denominated as judicial in nature. Cf. Interpretive Commentary, Vernon's Ann. Tex. Const. Art. V, Sec. 18; Comment, 11 Tex. L.Rev. 518 (1933).

county, is composed of five members: the County Judge—who is elected in a countywide election and, in addition to his regular judicial duties, serves *ex officio* as the presiding officer of the Commissioners Court[4]—and four commissioners, one elected from each of the four precincts into which the county is divided. That division is made by Commissioners Court itself. Each commissioner is elected by the qualified voters in the particular prescribed precinct which he represents.[5]

Article V, Section 18, of the Texas Constitution provides that a "County Commissioners Court * * * shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of this State * * *." The constitutional and statutory provisions delineating the major functions and powers of such bodies are set out in considerable detail in the Appendix to petitioner's brief (pp. 2–41). A summary of these functions and powers is contained in the Interpretive Commentary accompanying Article V, Section 18, of Vernon's Annotated Texas Constitution, which states:

> The county commissioners court * * * is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer,

[4] The County Judge votes only in cases of a tie vote among the four commissioners (R. 60).

[5] Vernon's Ann. Tex. Const. Art. V, Sec. 18. That section further provides that county commissioners shall be elected for four-year terms. Compare Vernon's Ann. Civ. Stat. Art. 2339.

fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as the board of equalization for tax assessments.[6]

In addition to these more important powers and functions, the governing boards of Texas counties have specific authority to build, purchase and maintain all county buildings, including a county hospital;[7] to establish, direct and make appropriations for a Child Welfare Board;[8] to appropriate money for public health and sanitation;[9] to create regional public housing authorities;[10] to create and control parks and recreational facilities;[11] to hold and dispose of all lands granted to the county for educational purposes;[12] to establish free libraries;[13] to exercise the power of eminent domain;[14] and to change the boundaries of in-

[6] Statutory authorization for the performance of the eleven listed functions is contained in the following articles, respectively, of Vernon's Ann. Civ. Stat.: 2351—2688, 4423, 4478, 6743 and 6869d—2355—2351—2351 and 2356—695a, 4418f, 4436a-1 and 4478—2.01-2.04 and 3.01 of the Election Code—2352 and 2354—718 and 719—689a-11 and 1666—7345d. Article VIII, Sec. 18, of the Constitution also provides for the last of the specified functions.

[7] Vernon's Ann. Civ. Stat. Art. 2351, 2370, 2370b, 4478, 4492.

[8] Vernon's Ann. Civ. Stat. Art. 695a.

[9] Vernon's Ann. Civ. Stat. Art. 4418f.

[10] Vernon's Ann. Civ. Stat. Art. 1269k, Sec. 23a.

[11] Vernon's Ann. Civ. Stat. Art. 1015c, 6078, 6081f.

[12] Vernon's Ann. Tex. Const. Art. VII, Sec. 6.

[13] Vernon's Ann. Civ. Stat. Art. 1677.

[14] Vernon's Ann. Civ. Stat. Art. 3264a.

dependent school districts in "the public good."[15] They are also charged with dividing the county into precincts for the election of the commissioners, justices of the peace and constables.[16] However, the only directive or guidance provided by State law for the drawing of precinct lines is that they be drawn "for the convenience of the people."

With respect to the Commissioners Court's duty to function as the board of tax equalization, the commentary accompanying Article VIII, Section 18, of Vernon's Annotated Texas Constitution states as follows:

> The board is charged with the inspection, correction, equalization, and approval of assessments. This mandate makes the board an essential cog in the machinery of assessment * * *. There is no state equalization agency.

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[15] Vernon's Ann. Civ. Stat. Art. 2766. The powers and functions enumerated above are not, in the case of Midland County, Texas, idle or hypothetical. Without purporting to exhaust the list of powers actually exercised, members of the defendant Commissioners Court testified that that body set the *ad valorem* tax rate for all county property (R. 60, 97), adopted the county budget (R. 59, 97), authorized the sale and issuance of bonds (R. 97), let contracts for public works (*ibid.*), set the salaries of all elected officials (R. 59), called elections and canvassed the results (98–99), bought all county equipment (R. 59, 97), expended tax funds (R. 59, 62, 97) and functioned as the board of tax equalization (R. 60). Moreover, the commissioners recognized that, in carrying out these functions, they represented all the people in the county, not just those residing in certain areas (R. 53, 106).

[16] Vernon's Ann. Tex. Const. Art. V, Sec. 18; see also Vernon's Ann. Civ. Stat. Art. 2339.

> In essence, the board is responsible for the assessor's work and is given considerable power in carrying out this responsibility * * *.[17]

The fact that the Commissioners Courts are endowed with an expansive jurisdiction and exercise substantial and diverse powers which significantly affect and are vitally important to the citizens and residents of all parts of Texas has not gone unrecognized by the State courts. In *Ehlinger* v. *Clark*, 8 S.W.2d 666, 674, the Supreme Court of Texas stated:

> [V]arious articles of the statutes show that the county commissioners' court is the active governing body of the county, with a jurisdiction that touches in some respect almost every feature of the county's business.[18]

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[17] Interpretive Commentary, Vernon's Ann. Tex. Const. Art. VIII, Sec. 18. The commentary notes that a 1938 statewide tax survey revealed "almost a universal custom" of arbitrarily dividing the State into sections and arbitrarily affixing different tax rates, without regard to permanent improvements, proximity to markets, accessibility to modern conveniences and other important considerations.

[18] The same court, in *Pritchard & Abbott* v. *McKenna*, 350 S.W.2d 333, 335, stated that the law places a heavy responsibility on the Commissioners Court when it functions as the board of tax equalization and "of necessity, it must be given considerable power to carry out this responsibility."

In addition, the Texas Court of Civil Appeals has ruled that the term "county business" in Art. V, Sec. 18, of the Texas Constitution should be given a broad and liberal construction so as not to defeat the "real purpose" of that provision (*Rodgers* v. *Taylor County*, 368 S.W.2d 794, 796), and has stated that the powers of the Commissioners Courts must be broadly and liberally construed, and encompass the implied authority to do what may be necessary in the exercise of the duties expressly conferred on them (*El Paso County* v. *Elam*, 106 S.W.2d 393, 395).

Petitioner, a taxpayer and registered voter of Midland County and a resident of Commissioners' Precinct No. 1, brought this action "individually and on behalf of other persons similarly situated," in the Midland County District Court (R. 1). Named as defendants were the Commissioners Court and each of its members (R. 2).

The complaint, originally filed on December 12, 1962, and finally amended as of April 30, 1964 (R. 1–16), alleged that the present division of the county into commissioners' precincts violates the Fourteenth Amendment because of the gross disparity in the distribution of the population among the four precincts.[19] The precincts currently in use were adopted by the Commissioners Court, after public hearings, on August 31, 1963, and became effective on January 1, 1964 (R. 6–7).[20] Before instituting this action in 1962, and again in August 1963, petitioner had requested that the commissioners redistrict the county so as to establish equally populated precincts, but was unsuccessful on each occasion (R. 5–6).

More specifically, petitioner's complaint asserted that a majority of the commissioners are "elected by and answerable to less than 3% of the qualified voters

[19] Petitioner also attacked the validity of the districting arrangement as violative of certain provisions of the Texas Constitution (see R. 11–12).

[20] This was the first adjustment made in the precinct boundaries since 1908 (R. 2, 4). However, the changes made were only very minor insofar as they affected the distribution of population among the four precincts, and retained approximately the same gross disparities from a population basis as had existed previously (see R. 7–11).

of Midland County" (R. 11), and charged that, "[b]ecause great disparity in population and qualified voters among the Commissioners' precincts exists," those residing in Precinct No. 1—over 97 percent of the county's population—are "subjected to invidious and unjust discrimination," and have their voice as citizens "diluted" and their votes "debased" in effect (R. 13). Petitioner contended that the pertinent provisions of the federal and State constitutions required a division of the county "into Commissioners' precincts having as nearly as possible and practicable an equal number of people and qualified voters" (R. 12).[21] Finally, the complaint sought a variety of forms of relief, some in the alternative, directed toward correcting the existing disparity which existed among the prescribed districts (R. 13–15).

Midland County is situated in west central Texas. It has but one densely populated area, the City of Midland, which is surrounded by very sparsely populated rural areas.[22] Upwards of 90 percent of the

[21] Petitioner also charged that the members of the Commissioners Court, "acting as the Board of Equalization of Midland County have and will continue to value for State and County tax purposes all taxable property in Commissioners' precincts No. 2, No. 3, and No. 4 at an average of approximately 8% of its fair market value and all taxable property in Commissioner's precinct No. 1 at an average of approximately 18% of its fair market value," and that this constituted "arbitrary and unlawful action" resulting from an "abuse of discretion" in not dividing the county into equally populated election precincts (R. 11).

[22] Indeed, Midland is and has been "the only incorporated city, town, or village in Midland County, Texas" (R. 3).

population of the county lives in the urban center which, under the present districting plan, lies entirely within Commissioners' Precinct No. 1 (R. 5).[23] According to the 1960 census, Midland County had a population of 67,717, which was distributed among the four precincts, under the plan then in effect, as follows: No. 1 had 66,225, or 97.8 percent; No. 2, 298, or .44 percent; No. 3, 414, or .61 percent; and No. 4, 780, or 1.15 percent (R. 4).[24] The estimated 1963 county population was about 70,000 and was distributed, under the revised plan adopted on August 31, 1963, as follows: No. 1 had 97.01 percent; No. 2, 1.22 percent; No. 3, .59 percent; and No. 4, 1.18 percent (R. 8).[25] Under this plan, currently in effect, about 3 percent of the county's residents are represented by a majority of the body's members, and three of the four elected commissioners are chosen by 2.6 percent of the qualified voters. Conversely, those living in Precinct No. 1—97 percent of the population and the qualified voters of the county—are represented by and elect only one of the four commissioners. The

[23] The percentage of the county's total population living in the City of Midland has been consistently increasing over the years (see R. 3–4).

[24] Qualified voters, both before and after the 1963 modification of the precinct lines, were distributed among the four districts in substantially identical proportions (see R. 8–9).

[25] The complaint also alleged that other factors such as land area and assessed valuation of property similarly were grossly disproportionate among the four precincts (R. 9–10). We do not discuss these factors at length, since the overriding constitutional consideration, in our view, is whether the prescribed districts are substantially equal in population, although equal distribution of such other factors may of course be both desirable and equitable.

maximum population-variance ratio, under the revised plan, is about 164 to 1 (see R. 8); under the prior plan, it was over over 220 to 1 (see R. 4).

Three of the four commissioners testified at the trial in the Midland County District Court. Commissioner Moreland, from Precinct No. 3, stated that population was not an important factor in drawing the precinct lines (R. 80). Although Commissioner Osborne, of Precinct No. 4, testified that he considered population before voting for the adoption of the revised districting plan, he was unable to tell the court, even approximately, the distribution of population among districts (R. 102–106), and flatly stated that the commissioners "don't run the county according to population" (R. 90). Commissioner Bryant,[26] from Precinct No. 2, not only stated that population was not a major factor, but also declared that there ought to be a majority of rural representation on the county board, because all of the officials elected countywide resided in the City of Midland (R. 118–119, 125–126). He stated that the only way to assure the election of rural commissioners was by drawing the precinct lines in a way which would place all of the city dwellers in one district (R. 126).[27]

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[26] Since the decision of the Texas Supreme Court, the term of Commissioner Bryant has expired and the new commissioner for Precinct No. 2 is J. C. Brooks, who is participating in these proceedings.

[27] Commissioner Moreland explained that population was not an important factor since "the City of Midland has the city council and the mayor to run its business * * * and we have a whole county to run, and the law of Texas says that each county shall be divided into four precincts" (R. 81), and stated

At the conclusion of the trial, the district court entered its findings and judgment (R. 130–133). It found that over 95 percent of the population and over 97 percent of the qualified voters of Midland County resided in Precinct No. 1, and that "other pertinent factors, such as land area and taxable values * * * were grossly disproportionate" among the commissioners' precincts (R. 131).[28] The trial court fur-

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that the city dwellers were trying to take over control of county affairs, while, in his view, the existing arrangement "better serve[d] the people" (R. 82–83). Commissioner Osborne stated that, if the county board were apportioned on a population basis, he did not believe that any resident of the rural areas could be elected a commissioner (R. 108; see R. 126), and referred to himself as one of "the three rural commissioners" (R. 121). Thus, it seems clear that three of the four voting members of the Commissioners Court sought to district the county so as to maintain rural control and prevent the residents of the City of Midland from having more than one representative on the board.

An attempt was made to show that the districting scheme was designed to serve other purposes—*viz.*, rendering a potential racial-bloc vote impotent by avoiding the concentration of almost all Negroes in one equally populated district, and instead locating them in the one grossly overpopulated precinct where their vote is substantially diluted (R. 83–87), preservation of a "dry" precinct (R. 86), and manipulation of property tax rates (R. 68–72). However, these inquiries were inconclusive, and seem neither to establish nor refute the possibility that such factors influenced the districting arrangement.

[28] In addition, the court found that the August 31, 1963, modification "made only insignificant changes in the Commissioners' precincts as they existed" prior to that time (R. 131), and that the county "could have been divided into Commissioners' precincts on a basis or plan taking into proper account population, member of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people" (*ibid.*).

ther found that the defendant commissioners did not give "due and proper consideration" to the pertinent factors in devising the challenged districting plan, but rather acted out of "political expediency, to maintain the status quo, and to insure that the rural areas * * * would continue to elect a majority of the members of the Commissioners' Court" (R. 132). Having determined that there was no evidence to support or justify the existing division of the county into precincts, and that the plan was not for "the convenience of the people,"[29] the trial court concluded that the defendants had "acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination" (R. 132).[30]

Upon the basis of these findings, the district court decreed that the districting plan of August 31, 1963, and all prior plans be set aside, and ordered the defendant commissioners to adopt a new plan in which

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[29] That language is taken directly from Art. V, Sec. 18, of the Texas Constitution (see Pet. Br. App. 2).

[30] Although the trial court made no explicit reference to the Equal Protection Clause of the federal Constitution, it clearly appears that its holding was based on federal as well as State constitutional grounds. That seems plain since the complaint was grounded squarely on the Fourteenth Amendment as well as the Texas Constitution, and is confirmed by the court's finding of "invidious discrimination" (see, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 561), a traditional Equal Protection Clause concept, especially in the instant context. And both of the State appellate courts viewed the district court's decision as having been grounded, at least in part, on a federal constitutional basis (see R. 135–137, as to the Court of Civil Appeals; R. 144, 150, as to the Supreme Court).

each precinct "will have substantially the same number of people" (R. 133).

On appeal, the Texas Court of Civil Appeals reversed the judgment of the trial court and, without remanding, entered judgment for the defendants (R. 134–140). That court confined itself to the issue whether the Commissioners Court was under any obligation, under federal or State law, to establish precincts substantially equal in population.[31] Concluding that no such obligation exists, since "there is no law or constitutional requirement" as to population-based districting for Texas county boards, the appellate court held that the district court had no authority to enter its decree and that no useful purpose would be served by a remand (R. 140).

On Writ of Error to the Supreme Court of Texas, the judgment was again reversed.[32] Relying on *Baker* v. *Carr,* 369 U.S. 186, and two cases decided by Texas state courts, the Supreme Court held that petitioner had a justiciable interest in the cause (R. 144). The court then indicated its agreement with the district court's conclusion that the existing districting plan was not supportable under State and federal constitutional requirements "for the reasons stated by the

[31] In the course of its opinion the court noted that petitioner had invoked "the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution" (R. 135).

[32] One judge dissented on the ground that the trial court's judgment was limited to requiring a redistricting based solely on population, a matter which had been decided correctly by the Court of Civil Appeals, and also because, in his view, petitioner lacked proper standing to challenge the existing districting scheme (R. 151–159).

trial court in its judgment findings" (*ibid.*). However, the court did not agree with the trial court that precincts must be drawn on an equal-population basis. Stating that recent developments had narrowed the major responsibilities of the Commissioners Courts to nonurban areas, and that "[t]he voice of the rural areas will be lost for all practical purposes" if the equal-population principle were applied to the election of commissioners, the court held that the requirement of the Texas Constitution that precincts be drawn for the "convenience of the people" warranted consideration of such factors as qualified voters, land area, geography, miles of county roads and taxable values (R. 149–150).[33] However, considering primarily the "convenience of the people" requirement of Art. V, Sec. 18, along with the equal rights clause of Art. I, Sec. 3, the Texas Supreme Court found "obvious arbitrariness" in the plan under attack because of the "patent malapportionment" which it involved (R. 150).

Although the Supreme Court reversed and remanded the cause to the trial court, the discretion of

[33] In so holding, the Texas Supreme Court plainly concluded that the federal Constitution's Equal Protection Clause does "not require a commissioner's precinct division of Texas counties" solely upon a population basis "in all cases * * *" (R. 150). Earlier it had stated that "there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights," but that "in the particular circumstances of a [Texas] county" there was a constitutional justification for "a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors * * *" (R. 149).

the lower court on remand was severely limited, for the reviewing court stated (R. 150): "[N]either this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate." In the precise language of the Texas Supreme Court, its judgment ordered the cause remanded to the trial court solely "for the entry of judgment in accordance with this opinion * * *" (R. 160).

INTRODUCTION AND SUMMARY

Involved in this case is the same basic constitutional question which was presented to the Court for decision, but left unresolved, in the four local government cases argued last Term.[34] That question, simply stated, is whether the equal-population principle of *Reynolds* v. *Sims*, 377 U.S. 533, and related cases applies to the district-based election of members of local governmental bodies. In the four cases considered last Term the government, as *amicus curiae*, filed an extensive brief (hereinafter "*Sailors* brief") developing some of the pertinent background and fully discussing the arguments which, in our view, support the application of the *Reynolds* principle at the local level. We do not repeat that discussion at length here;[35]

[34] *Moody* v. *Flowers* (together with *Board of Supervisors of Suffolk County* v. *Bianchi*), 387 U.S. 97; *Sailors* v. *Board of Education of the County of Kent*, 387 U.S. 105; *Dusch* v. *Davis*, 387 U.S. 112.

[35] We should like simply to incorporate by reference those parts of the *Sailors* brief which are of continuing relevance. To this end, and for the Court's convenience, additional copies of that brief accompany the instant brief.

rather, we confine ourselves in the main to showing the pertinence of the points developed in the *Sailors* brief to the districting arrangement here at issue—that for the election of members of the county governing board of Midland County, Texas. In the course of that discussion we seek to demonstrate that the judgment of the Texas Supreme Court under review was a final one, so that the exercise of this Court's certiorari jurisdiction is proper; that the *Sailors* and *Dusch* cases, the two local government cases in which the Court reached the merits last Term, are essentially narrow holdings which leave open the broad constitutional question presented in the instant case; and that, even if a distinction along functional lines is drawn, as to the applicability of the equal-population principle at the local level, the nature, functions and powers of governing boards of Texas counties are sufficiently substantial that these bodies should be included within the ambit of the constitutional rule.

Since we rely heavily on the discussion in our *Sailors* brief, a short summary of the essential points made there will provide a useful framework.[36] In the *Sailors* brief we took the basic position that, as a matter of consistent constitutional decision-making, logic and sound policy, the equal-population principle developed in the State legislative apportionment cases is applicable to local governmental bodies whose members are elected from districts. We noted that the Equal Protection Clause applies no less at the local

[36] In addition, references to various parts of that brief which are also pertinent here are included throughout the instant brief.

than at the State level of government (*Sailors* Br. 24–25), and that no prior decision of this Court has held the equal-population principle inapplicable at the local level (*id.* at 26–29). We asserted that no meaningful distinctions can be drawn between State legislatures and local governmental bodies insofar as the basic constitutional principle laid down in *Reynolds* v. *Sims* is concerned. That position was grounded both on the broad language used by the Court in its opinion in *Reynolds*, and on the basic approach and rationale adopted by the Court in that case—that a citizen's right to vote is unconstitutionally impaired when the weight of that vote differs significantly from that of those residing elsewhere within the same jurisdiction (*id.* at 29–41). We pointed out that the trend of authority in the State and lower federal courts overwhelmingly supports application of *Reynolds'* equal-population principle to local governmental bodies, and we discussed many of the cases in this regard (*id.* at 41–59).

In addition to these essentially legal arguments, we maintained in the *Sailors* brief that considerations of sound public policy argue for such an application, emphasizing the role of local governments, the damaging effects of malapportionment at the local level, and the important interest of newly enfranchised voters, under the Voting Rights Act of 1965, in fairly apportioned local governmental bodies (*id.* at 63–72). In the course of discussing the four cases then before the Court, we asserted that the equal-population principle certainly should be held applicable to the governing boards of counties and municipalities which are elected from dis-

tricts (*id.* at 73–92). We contended that school boards whose members are elected on a district basis should likewise be governed by that principle (*id.* at 92–101). And, although no such bodies were involved in the four pending cases, we suggested that, in our view, the *Reynolds* principle should be regarded, at least *prima facie,* as applying as well to those various kinds of local government units commonly referred to as special districts, where the governing boards of those units are elected from districts (*id.* at 101–106). Finally, we pointed out that, despite the large number of bodies potentially affected, application of the equal-population principle at the local level would not create an unmanageable problem for the judiciary (*id.* at 107–118).

Against this background, developed fully in the *Sailors* brief, we limit ourselves here to consideration of the reasons which support application of the equal-population principle to the instant districting arrangement. We of course take into account subsequent developments, including the decisions and opinions of the Court in the four cases of last Term, which pertain to the constitutional question here at issue, and certain of the views and approaches which were suggested during the course of oral argument in those cases. Initially, however, we address ourselves to the threshold jurisdictional question which was raised in one of the briefs in opposition to the petition for certiorari in this case.

ARGUMENT

I

THIS COURT'S JURISDICTION IS PROPERLY INVOKED TO REVIEW THE FEDERAL CONSTITUTIONAL QUESTION WHETHER THE EQUAL-POPULATION PRINCIPLE IS APPLICABLE TO THE MIDLAND COUNTY COMMISSIONERS COURT

Because the Texas Supreme Court, while rejecting petitioner's basic federal constitutional claim, nevertheless invalidated the present districting plan for electing the Midland County commissioners, principally on State law grounds, and remanded the case to the trial court, a question has been raised whether the judgment below finally disposes of the federal question so as to be reviewable here under 28 U.S.C. 1257 (see Respondent Commissioners' Brief in Opposition, pp. 4–6). To be sure, the Court's grant of certiorari in the face of this jurisdictional objection constitutes at least a preliminary ruling rejecting that contention. Yet, since that action does not foreclose the question of jurisdiction (*e.g., Jankovich* v. *Toll Road Comm'n,* 379 U.S. 487, 489), we address ourselves to it, mindful that a further postponement in the decision of the fundamental constitutional issue presented here would have unfortunate consequences, perpetuating the uncertainty that now prevails among the lower courts in the wake of this Court's decisions in last Term's cases.[37]

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[37] See note 54, *infra.* The instant decision is, moreover, in conflict with the result reached by the courts of last resort of California, New York, Wisconsin, Minnesota, Maryland, Missouri and South Dakota (see *Sailors* Br. 41–42, n. 46), and

1. It is clear beyond any doubt that the court below reached and decided the issue whether the Commissioners Court must be apportioned on the basis of the equal-population principle of *Reynolds* v. *Sims*, 377 U.S. 533, for the court declared (R. 150):

> We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States Constitutions do not require a commissioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the existence and effect of other relevant factors * * *.

Properly viewed, this statement is not simply *dicta* but, rather, constitutes a final holding on an issue the resolution of which was plainly vital to the court's disposition of the appeal. That holding—on the federal constitutional issue—is subject to further review only by this Court.

To be sure, as respondents point out (Br. in Opp. 4), the court below held the present districting arrangement violative of the Texas Constitution because of its

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also conflicts with the view of the only federal court of appeals to consider the constitutional issue on the merits. See *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 8d 123 (C.A. 4) (see also *Sailors* Br. 50–51, and n. 53).

"obvious arbitrariness" (R. 150).[38] But it did not stop there. Appropriately, the court also considered the question of permissible corrective measures to meet the requirements of State and federal law, and in so doing, it expressly authorized the Commissioners Court, when drawing new districts, to consider several factors which would clearly be precluded from consideration if the equal-population principle of *Reynolds* were applied (R. 149–150). Moreover, these factors were related, by the court below, to the convenience of the residents rather than to any federal constitutional requirements. Thus, the opinion of the Supreme Court is a clear statement that the equal-population principle does not apply to a Texas county's governing body.

2. Respondent commissioners also assert, in effect, that the decision below was not final, and therefore not properly reviewable by this Court, because the mandate of the Texas Supreme Court constitutes a general remand, reopening the cause "for a new trial on all issues" (Br. in Opp. 4–5). That suggestion, however, is wholly at odds with the language of the opinion and judgment in the case. Indeed, the order entered on July 13, 1966, states that the cause is remanded "for entry of judgment in accordance with this opinion" (R. 160), and an identical statement ap-

[38] This holding was apparently grounded on the requirement of the Texas Constitution that districts be drawn "for the convenience of the people," considered along with the equal rights clause of the State constitution, rather than on the Fourteenth Amendment to the federal Constitution, although this is admittedly not wholly clear from the court's opinion (see R. 144).

pears in the final paragraph of the court's opinion (R. 151).[39] The plain implication is that all issues have been finally resolved and that the trial court is charged only with entering an appropriate decree—a procedure fully consistent with Texas practice.[40]

Any doubt on this score is resolved, under Texas law, by looking to the opinion itself. See *Wells* v. *Littlefield,* 62 Tex. 28, 32; *Witherspoon* v. *Daviss,* 163 S.W. 700, 703. Here the closing paragraph of the Supreme Court's opinion states that the cause is remanded "for the entry of judgment" (R. 151). And the discussion of the limitations of judicial authority

[39] Thus, the less particularized statement, early in the opinion, to the effect that the court would "reverse the judgments below and remand the case to the trial court for further proceedings" (R. 141), must be understood as qualified by the direction at the close of the opinion and the language of the order actually entered.

[40] Nor are the authorities cited by respondents (Br. in Opp. 5) to the contrary. Rule 503, Texas Rules of Civil Procedure, merely provides that if the Supreme Court of Texas reverses the judgment of a lower court, it may remand the cause for another trial. In *Seydler* v. *Keuper*, 133 S.W. 2d 189, the appellate court, having reversed the judgment of the trial court and ordered the cause "remanded for another trial," merely held that it meant what it said and that at the new trial new allegations could be heard and decided. Similarly, in *First State Bank of Bishop* v. *Grebe*, 162 S.W. 2d 165, a mandate reversing and "remand[ing] to the trial court for further proceedings consistent with this opinion" was held to permit "a new trial on all issues of fact" because the order was "not modified by more specific instructions" (162 S.W. 2d at 169). That ruling is plainly inapplicable in the instant case, since (1) there remain no issues of fact, and (2) the mandate here specifically instructs the trial court to enter a judgment.

in fashioning relief makes clear the very limited nature of the remand (R. 150):

> [N]either this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. * * *

In light of this language in the Supreme Court's opinion, the district court could not, on remand, fashion a revised districting arrangement. At most, it could require the Commissioners Court to submit a plan for redistricting the county in accordance with the criteria stated in the opinion by the Supreme Court.[41] So viewed, the decision below is no less final than a holding on the merits accompanied by a retention of jurisdiction, or a remand to a lower court to do so, for the purpose of entering any further orders, if necessary, to ensure proper compliance with the basic holding by those affected thereby. See, *e.g.*, *Davis* v. *Mann*, 377 U.S. 678, 693.

3. As a matter of Texas practice, the judgment entered here would be viewed as a final one.[42] At all

[41] Retrial of all issues in the district court is thus plainly not contemplated by the mandate, and would be contrary to Texas practice. In addition, in light of the Supreme Court's disposition of petitioner's federal constitutional claims, it would be quite pointless. All of the facts necessary for the adjudication of these claims have already been found and are uncontroverted. No new findings of fact could conceivably change the Texas Supreme Court's view that the equal-population principle does not apply to Texas county boards. See *Spencer* v. *Pettit*, 34 S.W. 2d 798, 801.

[42] In Texas the general rule regarding the finality of judgments rendered by State courts is, in substance, that a final

events, it meets the standards of finality for review by this Court under 28 U.S.C. 1257—a matter as to which the State court's characterization, while relevant, is not controlling. See *Gotthilf* v. *Sills,* 375 U.S. 79, 80; *Department of Banking* v. *Pink,* 317 U.S. 264, 268; *Cole* v. *Violette,* 319 U.S. 581, 582; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 72. Here the judgment below is within the statute under all the relevant precedents, whether the focus is on the fact that "nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate" (*Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68), or on the appellate judgment as reflecting "the final word of a final court" in the State (*Market Street Ry. Co.* v. *Railroad Commission,* 324 U.S. 548, 551).

Of particular relevance here are *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, *Mills* v. *Alabama,* 384 U.S. 214, and *Brady* v. *Maryland,* 373 U.S. 83. In each of these cases, although the State appellate court had remanded for further proceedings, this Court held the judgment sufficiently final to permit review under Section 1257. It is enough to quote a pertinent passage from the opinion in the *Mills* case (384 U.S. at 217–218):

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judgment is one that determines the rights of all parties and disposes of all the issues. Application of that general rule in concrete cases makes it clear that, had the Court of Civil Appeals entered the judgment in question, that judgment would be considered final and reviewable by the Texas Supreme Court. See, *e.g., Railroad Commission* v. *Weld,* 66 S.W. 1095; *Hargrove* v. *Insurance Investment Corp.,* 176 S.W. 2d 744, 747; *Ferguson* v. *Ferguson,* 338 S.W. 2d 945, 947.

> * * * *[I]f the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. * * *[43]

In sum, it is abundantly clear that the judgment of the Texas Supreme Court here challenged is a final one for purposes of this Court's jurisdiction under Section 1257. The plain language of the mandate contemplated nothing more than the entry of judgment by the trial court in accordance with the views stated in the appellate court's opinion, and that opinion definitively resolved petitioner's federal constitutional claims against him, holding that the equal-population principle of *Reynolds* was inapplicable. That ruling is plainly not subject to relitigation upon remand, however the Texas court's mandate is read. Thus, the judgment below, at least as to the federal

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[43] For a general discussion of the relevant criteria in determining the finality of State court decisions, see Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality"*, 19 Stan. L. Rev. 907, 934–943 (1967).

constitutional question on which this Court's jurisdiction is necessarily grounded, is a final one and is reviewable presently by this Court.

II

NONE OF THE LOCAL GOVERNMENT CASES DECIDED LAST TERM RESOLVE THE CONSTITUTIONAL QUESTION HERE AT ISSUE

There can be no serious contention that the Court's decisions in the four local government cases argued last Term expressly or impliedly resolved the basic constitutional question involved in the instant case—whether the equal-population principle of *Reynolds* applies to local governmental bodies whose members are elected from districts. That is, of course, self-evident with respect to the cases involving county governing boards—*Moody* and *Bianchi*—which the Court disposed of solely on jurisdictional grounds.[44] Indeed, in the course of its *Moody-Bianchi* opinion, the Court

[44] In *Moody* and *Bianchi* the Court concluded that three-judge courts had been improperly convened, since State statutes of general application were not challenged in those cases, and that therefore it lacked jurisdiction on direct appeal (387 U.S. at 104). Thus, the judgments in those cases were vacated and the causes remanded to the district courts for the entry of a fresh decree to permit the perfection of a timely appeal to the appropriate court of appeals. In *Bianchi*, upon remand, the district court dismissed the action, concluding that *Reynolds* was inapplicable at the local level, a holding contrary to the unanimous view of the three-judge court which had decided the case previously. *Bianchi* is now before this Court again, on petition for certiorari before judgment in the court of appeals, as No. 591, this Term, and the government has filed a memorandum suggesting that certiorari be granted and the case scheduled for argument with the instant case.

specifically stated that it "indicate[d] no views on the merits" of the controversies there involved (387 U.S. at 102).[45] Nor was the broad constitutional question here presented reached in either of the two cases decided on the merits—*Sailors* and *Dusch*.[46]

As to *Sailors*, the essence of the Court's extremely narrow holding in that case is that there is no constitutional inhibition on an arrangement involving the *appointment*, as distinguished from the election, of members of a local governmental body exercising *administrative*, as differentiated from legislative, functions. In distinguishing *Reynolds* and cases such as *Gray* v. *Sanders*, 372 U.S. 368, and *Wesberry* v. *Sanders*, 376 U.S. 1, the Court pointed out that "[t]hey were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials" (387 U.S. at 108).

[45] See also the *Sailors* opinion, reserving the broader constitutional issues raised for cases such as *Bianchi*, which, the Court expressly noted, it had "disposed of on jurisdictional grounds" (387 U.S. at 110). Recognition of the jurisdictional problem in *Moody* and *Bianchi*—otherwise better vehicles for a broad-based consideration of the constitutional issues than *Sailors* and *Dusch*—led the government to support the granting of certiorari in the instant case and to suggest that it be set down for argument with the other cases. See Memorandum for the United States as *Amicus Curiae* in *Avery* v. *Midland County, Texas*, No. 958, 1966 Term, p. 6, n. 7.

[46] While the government argued that *Sailors* and *Dusch* presented the broad constitutional question, the Court focused on unique features of those cases and the schemes there challenged, and decided the cases on those grounds, thus obviating any necessity for deciding that question. In short, the Court simply concluded that the equal-population principle, assuming its applicability at the local level generally, did not invalidate the particular arrangements at issue in those cases.

In the *Sailors* opinion the Court noted that, even were it to "assume *arguendo* that where a State provides for an election of a local official or agency, the requirements of *Gray* v. *Sanders* and *Reynolds* v. *Sims* must be met * * *," that would not answer the question whether, under the Equal Protection Clause, "Michigan may allow its county school boards to be appointed" (*id.* at 109). Having found the "system for selecting members of the county school board" there involved to be "basically appointive rather than elective," the Court deemed it unnecessary to decide "whether a State may constitute a local legislative body through the appointive rather than the elective process," since that county school board "performs essentially administrative functions" which "are not legislative in the classical sense" (*id.* at 109–110). Again, in closing its opinion in *Sailors,* the Court reiterated that its holding was a quite limited one, stating (*id.* at 111), "If we assume *arguendo* that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray* v. *Sanders* and *Reynolds* v. *Sims* must be met, no question of that character is presented," and concluded (*ibid.*): "Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."[47]

[47] To be sure, the Court included in its *Sailors* opinion a quotation from *Reynolds* relating to the non-sovereign status of political subdivisions which several courts have referred to in support of a determination that the equal-population principle

Obviously, therefore, the holding and opinion in *Sailors* have no bearing on the decision in the instant case.[48] Indisputably, the members of the county governing board here involved *are* determined through the elective process; they are not chosen "by the governor, by the legislature, or by some other appointive means rather than by an election" (*id.* at 108). *Sailors* holds no more, in our view, than that the equal-population principle is inapplicable where members of a local

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is inapplicable at the local level (387 U.S. at 107–108). That language is plainly explicable by the context in which it appears in the *Reynolds* opinion—refutation of reliance on the federal analogy (see *Sailors* Br. 34–35, n. 37)—and was, in our view, included in the *Sailors* opinion in connection with the accepted proposition that a State "has vast leeway in the management of its internal affairs" (387 U.S. at 109). As part of the same discussion, the Court stated that "[a] State cannot of course manipulate its political subdivisions so as to defeat a federally protected right * * *" (*id.* at 108), "[n]or can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority" (*id.* at 108, n. 5). Against this background and in light of express statements that the broad question of applicability was not reached, it can hardly be contended that the inclusion of this quotation implicitly resolved that question.

[48] In *Sailors* the government urged that, even with what we characterized as the two-step election scheme involved in that case, the equal-population principle should be held to apply, since at least an indirect election system was involved (*Sailors* Br. 98–99). But that argument was rejected (see 387 U.S. at 109–110, n. 6), the Court stating that "the membership of the county [school] board is not determined, directly or indirectly, through an election in which the residents of the county participate." That language, and the *Sailors* opinion as a whole, plainly leaves open the question of the applicability of *Reynolds* to school boards whose members are elected from districts. While that question is of course not presented in the instant case, it is assuredly one of continuing importance (see *Sailors* Br. 92–94; see also note 70, *infra*).

body exercising essentially administrative functions are appointed rather than elected. Two questions were explicitly left open for decision in *Sailors*. One of these—whether a local legislative body may be constituted through the appointive rather than the elective process—is rather clearly not involved here.[49] Even if the county governing board of Midland County is not viewed as exercising legislative functions—we submit that it should be so regarded, if that consideration is pertinent (see *infra*, pp. 58–60)—its members are elected and not appointed. On the other hand, the other question left unresolved in *Sailors*—whether the equal-population principle applies where the members of a local governmental body are in fact elected under State law—is of course squarely presented for decision in the instant case.

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[49] Since not presented for decision here, the government takes no position on this question in the instant brief, except to note that our basic approach has assumed that no inhibition exists on States in determining that local officials are to be appointed rather than elected, without regard to whether the bodies on which they serve are legislative or nonlegislative in character. Of course, the constitutional question posed by the Court as to the appointment of local legislative bodies remains an open one, and may be presented for decision in some subsequent case. We should add that, however that question is ultimately resolved, an appointive scheme might in any event be subject to constitutional challenge if the system or process through which the appointment is accomplished is irrational or discriminatory in nature (see *Sailors* Br. 37, 74). Cf. *Fortson* v. *Morris*, 385 U.S. 231, 235. Another aspect of the position previously taken by the government is that at-large elections, where all or some of the members of the body are elected by all of the unit's voters, are constitutionally valid; that view was of course confirmed by the Court's holding in *Dusch* (see *infra*, p. 33).

Nor is *Dusch*—the other case in which the Court reached the merits last Term—of controlling significance, or even direct relevance, here. Again, this Court's opinion makes it clear that its disposition in that case was not based on a resolution of the broad constitutional question. Early in its opinion in *Dusch*, the Court noted that in *Sailors* it had "reserved the question whether the apportionment of municipal or county legislative agencies is governed by *Reynolds* v. *Sims*," and stated that, "though we assume *arguendo* that it is * * *," the decision below was erroneous on the particular facts there involved (387 U.S. at 114). We do not mean to intimate that the Court's *arguendo* assumption in this regard—in both the *Sailors* and *Dusch* opinions—constitutes an implicit determination of the broad constitutional question in favor of applicability. At the least, however, this language plainly shows that neither of these cases is controlling and that the question remains open for decision here.

Like *Sailors, Dusch* involves a rather narrow holding premised on the unusual factual situation there presented.[50] Finding that the so-called 7–4 plan under

[50] In *Dusch* the government maintained that, despite the at-large feature and the analogy to *Fortson* v. *Dorsey*, 379 U.S. 433, the Court should hold the 7–4 plan there involved invalid. That position was grounded on the consideration that, while all council members were elected at large, the range of choice of candidates was significantly affected by the residence district requirement, where, as there, the residence districts prescribed were grossly disproportionate in population, unlike the situation in *Fortson* (*Sailors* Br. 86–89). We pointed out that not only would the voters' selectivity among candidates be substantially reduced under the scheme, but also that it is a fair as-

which members of the council of the recently consolidated city of Virginia Beach were elected did not constitute an "invidious discrimination", the Court concluded that the at-large feature of the plan, whereby all voters elected all 11 councilmen, was sufficient to save the scheme from constitutional attack, since each councilman presumably represented all of the city's voters and not just those residing in the residence district in which he was required to live (387 U.S. at 115–116).

In addition, the Court noted that the arrangement constituted an accommodation to the problems incident to consolidation, that the scheme was such that the more populous boroughs could elect a majority and possibly all of the council, and that "different conclusions might follow" if "residence [were] only a

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sumption that those members residing in the sparsely populated districts will not adequately represent those persons living in the more populous areas. That argument was rejected by this Court, which found the residence district requirement "not fatal" and relied on *Fortson* in stating that each of the seven members required to live in prescribed districts was "nonetheless the city's, not the borough's councilman," and took the view that the fact that "[i]n *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely," was not dispositive (387 U.S. at 115–116). We point out, however, that in addition to the Court's *caveat* that "[i]f a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow" (*id.* at 116), the *Fortson* opinion noted that "designedly or otherwise, * * * under the circumstances of a particular case," such schemes might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population" (379 U.S. at 439; see also 387 U.S. at 117, quoting similar language from the district court's opinion).

front" and "a borough's resident on the council represented in fact only the borough * * *" (*id.* at 116).[51]

[51] In the concluding paragraph of the *Dusch* opinion, the Court stated that the 7–4 plan "seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. at 117). In light of the rejection of the argument in *Reynolds* and related cases that rural areas should be accorded more representation than population alone would give them (see 377 U.S. at 567–568), this language can hardly be read as sanctioning the favoring of rural over urban residents simply because of where they live. Rather, an important concern of the Court apparently was the preservation of flexibility with respect to governmental arrangements achieved through compromise incident to a consolidation of previously separate local units—there a city and county which merged into one large municipality. This view is confirmed by the extensive quotation from the district court's opinion which the Court included just prior to this language (387 U.S. at 116–117). That quotation refers to the need, "during an appreciable transition period," for a compromise arrangement which would ensure some voice for all areas of the newly formed city, and notes that the plan gives no "controlling influence" to the smaller boroughs (*id.* at 116). On this latter point, the Court itself, noting the population of the various boroughs, pointed out that the more populous boroughs could elect all eleven councilmen "if united in their efforts" (*id.* at 117, n. 5). Likewise, the Court must also have taken into account the fact that the larger boroughs could, despite the disparity in population among the seven residence districts, elect at least a majority of the members of the city council from among their own residents. This is so, of course, because four of the eleven seats had no residence requirement. Lynnhaven and Bayside, with over 60 percent of the city's population, could thus elect at least a majority of the council members, *i.e.*, the four at-large members and the two from those two residence districts. Those two salient features of the Virginia Beach situation—consolidation of formerly independent governmental units and the ability of those residing in the more populous residence districts to elect a majority of the members of the body—will not generally be

How broadly or narrowly the *Dusch* holding should be applied in other situations remains an open question. There appear to be significant hazards in an expansive reading of that decision, and, pressed to the ultimate, *Dusch* may have untoward and undesirable consequences in other similar, yet distinguishable, situations. Indeed, although we do not so interpret it, *Dusch* might be regarded as holding that, however disparate the population of prescribed residence districts, and whatever the circumstances which led to the adoption of such a plan, the scheme meets constitutional muster so long as an at-large election is provided for and all of the voters in the jurisdiction participate in that election. At least one court of appeals already has apparently so construed that decision. In *Davis* v. *Thomas County, Georgia,* No. 23,882 (decided June 26,

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presented in other cases in which reliance on *Dusch* is sought to be placed. Those considerations were undoubtedly of considerable significance in shaping the Court's conclusion that the plan involved no "invidious discrimination", and provide, in the government's view, a proper rationale for limiting the sweep of that holding and avoiding the undesirable consequences which might otherwise flow from a broad reading of *Dusch* (see the discussion *infra*, pp. 35–36). The fact that those residing in the populous areas can elect a majority of the body's members—a situation not presented in a recent Fifth Circuit decision relying on *Dusch* (see *infra*, p. 36) nor under many schemes where residence districts are prescribed for every seat—is undoubtedly an important factor in determining whether there is any significant impairment of the right to vote. Similarly, the fact that a particular plan arose out of circumstances of consolidation of governmental units is a relevant consideration is assaying the fairness of a particular plan (see *infra*, pp. 37–38). That too will be the unusual, rather than the ordinary, situation.

1967), the Fifth Circuit affirmed the dismissal of a complaint challenging the districting scheme for the election of a Georgia county board on the authority of *Dusch*. There all of the eight members were elected at large, but of the prescribed residence districts, only two were allocated to the City of Thomasville, although about 60 percent of the county's population resided there.[52]

So viewed, then, *Dusch* would be an open invitation to avoid the implications of *Reynolds*, at least at the local level, through the device of unequally populated residence districts coupled with at-large elections. And it is difficult to see why, if that is indeed the teaching of *Dusch*, such a device could not be utilized at the State legislative level as well. But it is not, in our view, necessary to construe that holding expansively. A narrow reading of *Dusch*, which would limit it essentially to the factual circumstances there involved, is not foreclosed to the Court, can be predicated on sound grounds, and seems to us to be plainly indicated.

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[52] Similarly, it has come to our attention that several suits challenging districting arrangements for Mississippi county boards have been or will be dismissed on the basis of the county's adopting, of being ordered to adopt, an at-large election scheme, while maintaining the grossly disproportionate districts, which had existed previously, as residence, instead of election districts. That procedure is authorized by a 1966 Mississippi law—Section 2870, Miss. Code Ann., as amended (see *Martinolich* v. *Dean*, 256 F. Supp. 612, 616 (S.D. Miss.); see also *Sailors* Br. 89, n. 88). In *Martinolich* the three-judge court which held the existting plan invalid was dissolved, and a single judge ordered at-large elections in Hancock County as authorized by the recently amended law.

In *Dusch* the Court stressed its concern that application of the equal-population principle at the local-governmental level might have the undesirable effect of deterring consolidation of previously independent local units (see note 51, *supra*). Assuming its relevance, we believe that consideration can be taken into account consistent with *Reynolds* and with its application at the local level. Accordingly, in our view, there is no reason to create a constitutional anomaly by holding *Reynolds* inapplicable at the local level because of the possibility that some consolidations of local units might be deterred if it were held applicable. Nor does this consideration require a mechanical rule that would condone any district arrangement, however significant the deviations from a population basis, if a consolidation at the local level is involved. There is little evidence of any substantial movement towards consolidation at the local level, except as among school districts (see *Sailors* Br. 19, n. 27), and, of course, constitutional decision-making cannot be controlled by the mere chance that a few desirable developments in governmental restructuring might thereby be fostered. It would be anomalous indeed if gross inequality in voting rights were to be regarded as an acceptable price for an insubstantial amount of governmental reorganization.

This is not to say, however, that a flexible approach toward consolidations at the local level cannot be taken, consistent with *Reynolds* and the Equal Protection Clause. When a consolidation has in fact been

accomplished, it would be appropriate to sanction some deviations from a population basis in the local body's districting plan if those deviations were rationally related to the compromise necessary in achieving consolidation, will be reconsidered and probably revised after an interim period of adjustment, and are not so extreme as to permit minority dominance of the particular body. That would not be at odds with the rejection of the so-called federal analogy as to State legislative arrangements in *Reynolds,* for the Court there noted that the representational system for Congress was "one conceived out of compromise and concession indispensable to the establishment of our federal republic" (377 U.S. at 574), whereas the invocation of that precedent at the State level was often "little more than after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements" (*id.* at 573). As to governmental arrangements at the local level, however, reliance on the necessity for compromise would not necessarily be but "an after-the-fact rationalization" for a maladjusted scheme. Rather, such compromise as to the representational system may justifiably be shown to have been an essential ingredient in achieving the consolidation, with formerly separate units agreeing to go along only if some of their previous quasi-sovereignty over local matters is preserved. See Note, *Reapportionment,* 79 Harv. L. Rev. 1228, 1278–1280 (1966); see also Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government,* 65 Colum. L.

Rev. 21, 36–40 (1965); cf. *Blaikie* v. *Wagner*, 258 F. Supp. 364, 367–370 (S.D. N.Y.).[53]

In discussing an approach which, consistent with applying *Reynolds* at the local level, would maintain flexibility in circumstances involving a consolidation of local units, we do not mean to suggest that the Court must resolve the question in this case. But if we are correct in our conclusion that the fundamental constitutional issue whether *Reynolds* is generally applicable at the local governmental level is not to be dictated by the consideration that intergovernmental consolidations may sometimes require compromise as to districting arrangements, it is apparent that the *Dusch* holding plays no significant role in the instant situation. Not only is it at all events clear that *Dusch* did not resolve the broad constitutional question here presented. No consolidation was achieved or attempted in Midland County. No residence districts are involved in the districting plan under attack—the districts prescribed are plainly election districts. There is no at-large election of county commissioners in Midland County—each is elected within his own district and only by the voters residing in that particular district. Thus, even if *Dusch* is read broadly—as the Fifth Circuit did in *Davis* (see *supra*, pp. 35–36), it has no bearing on the resolution of the question whether, where a district-based election of members of a local governmental body is involved, the equal-population principle of *Reynolds*

[53] See generally U.S. Advisory Commission on Intergovernmental Relations, Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas (1962).

requires that the prescribed districts be substantially equal in population.[54]

[54] Only a few other decisions by lower courts on the question of the applicability of the equal-population principle at the local level, which have intervened or have come to our attention since the filing of our *Sailors* brief last Term, are deserving of mention. In *State of Indiana* v. *County of Lake*, 27 Court Decisions on Legislative Apportionment (National Municipal League) (hereinafter "C.D.L.A.") 1 (Lake Co., Ind. Super. Ct.), the court ordered the Gary Common Council to pass an ordinance effecting "an apportionment of the electors in the City of Gary in order that each of the six councilmanic districts of the City of Gary shall contain as nearly as possible an equal number of electors" (*id.* at 3). Similarly, a number of New York State courts have recently applied the holding of *Seaman* v. *Fedourich*, 209 N.E. 2d 778, where the New York Court of Appeals determined that *Reynolds* applied at the local governmental level (see *Sailors* Br. 43–44, and n. 48) to additional county boards and city councils in that State. In addition, the New York Court of Appeals has recently reaffirmed its holding in *Seaman*, in a case decided subsequent to and in light of this Court's holdings in *Sailors* and *Dusch*. In that case, *Iannucci* v. *Board of Supervisors of Washington County*, 20 N.Y. 2d 244, the New York court viewed this Court's decisions as not resolving the basic constitutional question and thus not impairing its earlier holding in *Seaman*. Mention should also be made of *Skolnick* v. *Kerner*, 387 U.S. 91, involving a challenge to judicial apportionment in Illinois, where the appeal was dismissed for want of a substantial federal question. See also *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3, where the district court dismissed an action challenging the allocation of common pleas court judges among the counties in Ohio, on the ground that judges, unlike legislators, do not function as representatives, even if elected, and that *Reynolds* thus did not apply, and *New York State Ass'n of Trial Lawyers* v. *Rockefeller*, 267 F. Supp. 148 (S.D. N.Y.), a virtually identical case which was disposed of in a similar fashion. In regard to other similar cases, see *Sailors* Br. 106–107, n. 110. And see *Shanker* v. *Regents of the University*, 19 N.Y. 2d 951, where the New York Court of Appeals affirmed the Appellate Division's holding (27

III

NO DISTINCTION SHOULD BE MADE ON FUNCTIONAL LINES IN REGARD TO THE APPLICABILITY OF THE EQUAL-POPULATION PRINCIPLE AT THE LOCAL LEVEL

Certain of the language in this Court's opinion in the *Sailors* case (see *supra*, pp. 28–29) might possibly be read as suggesting a distinction as to the applicability of the equal-population principle depending upon a classification of the functions performed by various local governmental bodies. And much of the questioning at the oral argument of the four cases decided last Term similarly indicated a concern as to the nature and powers of the bodies involved. Some support for limiting the applicability of *Reynolds* to bodies which exercise legislative as distinguished from essentially administrative functions might also be drawn from language in various State and lower federal court

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App. Div. 2d 84). that the system of electing members of the Board of Regents of the University system in New York did not violate the Equal Protection Clause. That system involved the election of the 15-member board by the State legislature; eleven are chosen from the State's eleven judicial districts, which are disproportionate in population, and four at large. In affirming upon the Appellate Division's opinion, the Court of Appeals cited this Court's decision in *Sailors* as additional authority (19 N.Y. 2d at 952). Finally, mention should also be made of *Detroit Edison Co.* v. *East China Twp. School District No. 3*, pending on petition for certiorari, No. 543, this Term, which does not involve a direct challenge to the composition of a local governmental body, but instead relates primarily to the propriety of the annexation procedure utilized in consolidating school districts (see *Sailors* Br. 59, 94).

opinions in local government cases.[55] And an argument along these lines might be evolved from some of the language of the *Reynolds* opinion itself and from the fact that the bodies involved there and in related cases, and in *Wesberry* v. *Sanders*, were all legislative in character. It is the government's position, however, that such a distinction is neither sustainable as a matter of constitutional law nor desirable or practicable as a matter of judicial policy. But the recurrence of the notion of a functional distinction suggests a fuller exposition of our views on this matter.

1. As developed at some length in the *Sailors* brief (pp. 38–41), the Court's decision in *Reynolds* was not grounded on any considerations unique to, or inherent in, State legislatures, as distinguished from other sorts of governmental bodies whose members are elected from districts. While there are some references in the *Reynolds* opinion to the fact that State legislators

[55] *E.g.*, *Seaman* v. *Fedourich*, 209 N.E. 2d 778, 782 (N.Y. Ct. App.); *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249, 255 (Wis.); *Hanlon* v. *Towey*, 142 N.W. 2d 741, 745 (Minn.); *Armentrout* v. *Schooler*, 409 S.W. 2d 138, 143 (Mo.). It should of course be noted that any suggestion of a distinction along legislative/administrative lines by these courts was simply *dicta*, since all of the courts regarded the bodies whose districting was at issue to be sufficiently legislative in character and thus concluded that, at least as to those kinds of bodies, the equal-population principle was applicable. Compare, however, *Strickland* v. *Burns*, 256 F. Supp. 824 (M.D. Tenn.), and *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Pa.), in which *Reynolds* was applied to districting arrangements for school boards which could hardly be viewed as essentially legislative in character; compare also *McMillan* v. *Wagner*, 21 C.D.L.A. 101 (S.D. N.Y.) (see the discussion in note 59, *infra*).

exercise law-making functions,[56] the constitutional touchstone of that decision is the Equal Protection Clause of the Fourteenth Amendment, and the focus is on the individual voter, not the nature of the bodies whose apportionment was at issue. The essence of the holding in *Reynolds* certainly transcends the particular factual circumstances out of which that and related cases arose; it is more basic—that a citizen's right to vote, where conferred under State law, cannot be diluted or debased simply because of where, within a particular area, that citizen happens to reside.[57] Residence, in other words, is an impermissible

[56] An argument grounded on certain language in *Reynolds* in this regard (see 377 U.S. at 562, 565) is quite unconvincing, in our view, because it seems quite reasonable for the Court to have there used language relating to the type of governmental body before it in that case. Similarly, the fact that the bodies involved in *Reynolds* and related cases and in *Wesberry* were legislative in character cannot properly be viewed, as a constitutional matter, as a determinative factor in those decisions (see the discussion *infra*, pp. 43–45; see also *Sailors* Br. 32–33, 38–40, 73). Rather, language such as that in *Reynolds*, stating that State legislatures "are responsible for enacting laws by which all citizens are to be governed" (377 U.S. at 565), or that in *Wesberry*, referring to "the election of those who make the laws under which, as good citizens, we must live" (376 U.S. at 17), did no more than accurately refer to the context in which those decisions were rendered and the background against which the constitutional questions were presented. Cf. *Gray* v. *Sanders*, 372 U.S. 368 (see *infra*, pp. 44–45). Nor, as a matter of consistent constitutional decision-making, can those decisions be properly limited to the legislative situations there involved (see generally *Sailors* Br. 29–41).

[57] *Reynolds* was plainly not grounded on any considerations stemming from the Guaranty Clause, for the Court had earlier rejected the argument that apportionment questions were cognizable under that constitutional provision in *Baker* v. *Carr*, 369 U.S. 186, 218–229 (see 377 U.S. at 582).

basis on which to treat differently citizens otherwise similarly situated, and they are treated differently, as a constitutional matter—and thus discriminatorily—if the vote of one is overweighted and that of another underweighted under an apportionment or districting scheme (see 377 U.S. at 562–568). Such discrimination is neither greater nor lesser, whether malapportionment exists at the State or at the local level. Consistency and logic thus require application of the equal-population principle of *Reynolds* to local governmental bodies, once its constitutional underpinnings are recognized. Any other conclusion would result in a distinct constitutional anomaly, for the engrafting of a legislative/administrative line of distinction would, in our view, be a significant departure from the teaching of *Reynolds*.

Nor could such an approach be squared with this Court's decision in *Gray* v. *Sanders*, 372 U.S. 368. That case, decided before *Reynolds*—indeed the first case after *Baker* v. *Carr* decided by this Court on a substantive basis—and relied on in *Reynolds* (377 U.S. at 557–561), held the Georgia county-unit system invalid. While *Wesberry*, *Reynolds* and related cases involved legislative offices, *Gray* involved offices essentially executive and administrative in character, albeit Statewide in nature (see *Sailors*, 387 U.S. at 108, n. 4, for a listing of those offices). *Gray* is thus a constitutional precedent which plainly holds that the requirements of the Equal Protection Clause with respect to the weighting of votes in State elections are not limited to legislative offices (see *Sailors* Br. 83–

84, n. 79; see also note 56, *supra*); its impact in this regard cannot properly be disregarded.

In sum, if the Equal Protection Clause requires districts for electing State legislators to be substantially equal in population, it can hardly be inapposite with regard to the district-based election of members of local governmental bodies—however their nature, powers and functions be characterized. Otherwise, citizens similarly situated can be treated differently, as to the weight of their vote, on the basis of where they happen to reside. Thus the government's position is basically that, where State or local law provides for the election of members of local governmental bodies from districts, the Equal Protection Clause—and specifically the equal-population principle of *Reynolds* which derives from that constitutional provision—requires that those districts be substantially equal in population.

2. Not only would a legislative/administrative distinction, in regard to the applicability of the equal-population principle at the local level, be difficult to sustain as a matter of consistent constitutional decision-making; it would be wholly impracticable in any event. Espousal of such a distinction necessarily assumes that, as a practical matter, a line can be sensibly drawn in this regard, and that it is possible to categorize local governmental bodies as legislative or administrative. We regard this as a fallacious and potentially dangerous assumption.

Local governmental bodies—at least general-function units—are generally repositories of an amalgam of various powers and engage in a variety of dif-

ferent and diverse functions.[58] Some might be classified as legislative, some as administrative, some as executive, some as quasi-judicial, and some virtually defy description. One is often reduced to little more than quite arbitrary labelling. In his concurring opinion in *Strickland* v. *Burns*, 256 F. Supp. 824, 836 (M.D. Tenn.), Judge Miller perceptively concluded that "[i]t is fruitless * * * to pursue the elusive distinction between legislative and administra-

[58] See Note, 53 Va. L. Rev. 953, 960–961, 965–966 (1967), which explicitly questions the utility of a legislative/administrative distinction "as an analytical tool for dealing with the problem of representation in government at the local level," stating (*id.* at 965): "Seldom can any local governmental body be said to exercise solely administrative powers. The wide variation in the functions performed by these local bodies, and in many cases the mixture of functions assigned to one body, render any ~~not~~ nice distinctions very difficult to draw." Doubting "the validity of the distinction itself," it is further stated (*id.* at 965–966): "The changing nature of the functions performed by 'administrative' agencies in an economy which is taking on more and more aspects of government planning raises the question whether any segmentation of government powers between 'legislative' and 'administrative' can be made even in theory. * * * 'Administrative' bodies formulate and carry out policies whose ramifications are easily as great for various interests within the body politic as many decisions made by 'legislative' bodies. Neat compartmentalization of government functions, either in terms of types of decision-making or of the need for popular representation, no longer seems possible." See generally 2 McQuillin, *Municipal Corporations*, § 10.06, pp. 747–750; §§ 10.40–10.40a, pp. 845–854 (1966); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 (1965); see also Rhyne, *Municipal Law*, § 4–6, p. 69; § 5–2, pp. 79–80 (1957).

tive functions."[59] Indeed, it would appear to be not only a fruitless but a virtually impossible task. There is simply no easily available touchstone for determining whether a body exercises legislative functions or

[59] In *Strickland*, a county school board case, the court refused to accept the suggested legislative/administrative distinction, finding "no basis for applying the 'one man, one vote' rule to the congeries of powers possessed by the Legislature itself and at the same time denying its application to a subordinate body simply because it possesses a fractional part of those powers, so long at least as the fractional part cannot be said to be insignificant or unimportant * * *" (256 F. Supp. at 827). In concurring, Judge Miller further stated (*id.* at 836): "Many attempts have been made to draw the [legislative/administrative] distinction in varied contexts. But whatever value the dichotomy may have for some purposes to rationalize a particular result, I am convinced that it is inapposite here. So long as a subordinate body is vested with significant and important powers of government, whether they be labelled legislative, or administrative, or both, I can see no reason why it should be permissible under the equal protection clause for a state arbitrarily to debase the value of one person's vote in favor of another." See also *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 35 (W.D. Pa.), and Note, 20 Vand. L. Rev. 649 (1967), discussing *Strickland*. And in *McMillan* v. *Wagner*, 21 C.D.L.A. 101, the court denied a motion to dismiss grounded on the argument that the Board of Estimate of New York City does not possess legislative power and that *Reynolds* was inapplicable to local governmental bodies which are non-legislative in character. Holding that the Board members were the elected representatives of their boroughs and that the Board exercised governmental powers over a number of important matters, the court found any legislative/administrative distinction irrelevant, stating (*id.* at 109): "Defendants' characterization of these powers delegated to the Board of Estimate as 'executive-administrative,' and their distinction between 'executive-administrative' and 'legislative' powers, misconceives the scope of the reapportionment cases. The Supreme Court, in *Gray* v. *Sanders* * * *, held that citizens have a right to have their votes for state governor equally counted. No state office could be more clearly executive-administrative, and not legislative, than that of governor" (see *Sailors* Br. 53; see also *supra*, pp. 44–45).

whether its actions are essentially administrative in character. Given the mixture of powers which such bodies exercise, and the variety of fields in which at least general-function units act, there is not even a sound starting place for analysis along these lines. Certainly the power to enact ordinances, or the lack of that power, should not be regarded as determinative.[60] While most general-function units have the ordinance-enacting power, others which do not still take important and significant actions in a variety of other ways.[61] It seems plain that the *way* in which a body's

[60] Reliance on the ordinance-enacting power as a criterion for determining whether the local body is legislative or administrative in character would make the vagaries of State law decisive as to whether a federally protected right to equal representation at the local level would or would not exist. Thus, in effect, a State would be given the power to determine whether a particular local body, albeit elected by the people, would fall within or without the equal-population principle, simply on the basis of the manner in which it is authorized to act. Not only, then, would such a rule not be necessarily in accord with the substantive powers of the body; it would present an opportunity for manipulation that would have undesirable and anomalous consequences (see *Sailors* Br. 104–105). A local body in one State would be required to abide by the equal-population principle, while a like body in another State would not, although both exercise identical powers, simply because one could and did act through ordinances while the other, lacking the ordinance-enacting power, passed by-laws or resolutions relating to the same matters and having the same effect.

[61] Most municipalities have, through charter or statute, the authority to enact ordinances; many counties, on the other hand, do not have such power, but take official actions in a variety of different ways. In some States the authority of local bodies to enact ordinances is implied; in others it is held not to exist unless expressly conferred. See generally 2 McQuillin, *Municipal Corporations*, § 10.30, pp. 815–816; § 10.34, pp. 828–830 (1966); 5 *id.*, §§ 15.01–15.26, pp. 45–121 (1949).

powers are exercised cannot provide a useful criterion for constitutional decision-making. Tying the applicability of the equal-population principle at the local level to the power to enact ordinances would involve a highly formalistic approach not in accord with the underlying realities and would offer an easy avenue of escape from the thrust of *Reynolds* at the local level (see note 60, *supra*).

It would probably be possible to apply a legislative/administrative line of distinction to extreme cases at both ends of the local government spectrum. There are bodies whose powers and functions are so significant and sweeping that anyone would conclude that they of course are legislative in character; the city councils of our large cities and the county boards of our populous counties, particularly those exercising some form of home rule, would fit into such a category. Similarly, at the other extreme, there are undoubtedly bodies, even some general-function units, whose powers are so limited and whose functions are so circumscribed, that it would be rather easy to conclude that they simply cannot be said to be legislative in character. But, apart from these unusually clear-cut situations, there would remain the vast majority of local governmental bodies which defy any sort of easy characterization. Such labels could probably be attached eventually, and lines drawn in some fashion, but it would only be at the expense of having the judiciary—federal and State—almost interminably involved in that process. It would of course be up to this Court to give coherence and consistency, so

far as it would be possible to do so, to the predictably variant decisions—from State to State—of the lower federal and State courts, and thus this Court as well would be faced with the spectre of actively participating, in a substantial and continuing way, in this difficult line-drawing process. In the government's view, there is no warrant for imposing that additional burden on the judiciary, just as there is little assurance that the results of such an endeavor would be meaningful.

Thus, the sort of functional approach which some suggest, considering the nature of local governmental bodies, seems to be one which is unworkable in practice and virtually impossible of reasoned and judicially economical application.[62] We submit that a holding which would limit the scope of the equal-population principle to bodies exercising legislative functions would be both bad law and bad policy.

3. In opposing the drawing of a line between bodies exercising legislative powers and those engaged in essentially administrative functions, we do not reject the possibility that certain distinctions may nevertheless be relevant and feasible. While we continue to be-

[62] If any such distinction is to be drawn—and we do not suggest that it would be proper to do so—it would appear preferable to draw it according to whether the body exercises policy-making functions or, instead, acts in an essentially ministerial way in conducting its activities. That sort of line—distinguishing between bodies exercising "discretionary" powers and those with only "ministerial" functions—is already an accepted one in the local government context, would seem susceptible of somewhat easier application, and would also appear to accord more with the underlying realities. See generally 2 McQuillin, *Municipal Corporations*, §§ 10.32–10.33, pp. 818–828; §§ 10.40–10.41, pp. 845–858 (1966).

lieve that, at least *prima facie,* the equal-population principle should be held applicable to all governmental bodies elected on a district basis, we recognize that there might be particularized situations in which population should not be the sole determinant of compliance with *Reynolds*—at least as to so-called special districts.[63]

[63] We included in our *Sailors* brief (pp. 20–22, 101–106) a discussion of special districts in order to provide the Court with a complete picture of the background against which the broad constitutional question was presented (see *Sailors* Br. 101). And, although no such bodies were involved in the four cases then under consideration, we suggested that, as a *prima facie* matter, the equal-population principle should be regarded as applicable to them as well (*Sailors* Br. 103). While logic and consistency seem presumptively to support a straightforward application of that principle to the governing boards of special districts whose members are elected from districts, we indicated that our view as to its applicability to such units was a more tentative one than with respect to general-function units, like counties and cities, and to school boards, although the latter are more appropriately regarded as special-function units. Our guarded *caveat* in this regard was grounded upon the consideration that some special districts perform rather specialized functions which principally affect only a particular segment of the citizens residing within its jurisdiction—*e.g.*, conservancy, drainage or irrigation districts (see *Sailors* Br. 102–103).

Our *Sailors* brief also noted (p. 104) that some sort of *de minimis* rule might be evolved, at least as to special districts, which would except from the reach of the equal-population principle those bodies whose powers and functions are relatively unimportant and insignificant. We do not pursue that approach because such a rule would predictably leave within the ambit of the principle the vast majority of *elected* local bodies, since most of them, however their functions are characterized, in fact do important things which have a substantial impact on people. And, as developed in the *Sailors* brief (pp. 103–105), a *de minimis* rule would probably neither be productive of consistent results nor workable in practice.

As *Reynolds* itself points out, the Equal Protection Clause "has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged" (377 U.S. at 565).[64] Indeed, the Court's decision rests on the premise that "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live" (*ibid.*). Applying this consideration to local governmental bodies, it seems a fair and reasonable assumption that, with respect to general-function units, all citizens stand in substantially the same relation to such bodies regardless of where they live within the area of the particular body's jurisdiction (see the discussion *infra*, pp. 55–57). Similarly, all citizens appear to be similarly situated in regard to their respective school boards, because of the pervasive effect and broad sweep of public education in this country (see note 70, *infra*). But the same conclusion seems somewhat less obvious with respect to special districts. At least as to some of those

[64] Implicit in this traditional view in Equal Protection Clause litigation is the converse notion that, where persons are not similarly situated and do not stand in the same relation to the governmental action in question, different treatment is permissible and classifications are valid so long as they are rationally related to the purposes of the legislation and take properly into account the differences in how the persons are situated. For a more expansive articulation of the general approach taken in this regard in other Equal Protection Clause cases—albeit not involving voting rights—see *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488–489; *Morey* v. *Doud*, 354 U.S. 457, 465–466; *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527–528; *McLaughlin* v. *Florida*, 379 U.S. 184, 190–194. See also *Carrington* v. *Rash*, 380 U.S. 89, 92–93.

bodies, it may be too facile to infer from the decision to provide for an election from districts that all citizens are similarly situated *vis-à-vis* the particular body, and "stand in the same relation" with respect to the allocation of representation on that body.[65]

Where a governmental body's actions do not touch or involve citizens generally, but only a discrete and identifiable part of the citizenry in a significant way, then a districting plan which rationally takes this consideration into account may comport with the requirements of the Equal Protection Clause, even though this entails substantial deviations from a population basis. Such a plan might allow only certain persons to elect the members of such a body, might weight the votes of those directly affected by that body's actions more heavily than others, or might simply arrange the districts so that effect would be given to the fact that the body acts in a way which primarily affects only certain citizens.[66] This

[65] On the other hand, it could be maintained that the provision for district-based elections of the members of the governing boards of special districts should be regarded as reflecting a design that the particular body be controlled by the voters in the geographic area over which it has jurisdiction, and that, in such a situation, no further inquiry about that body's powers and functions should be made.

[66] For instance, in this limited situation, property-holding or taxpaying qualifications for voting might be appropriate (compare *Harper* v. *Virginia Board of Elections*, 383 U.S. 663), if the actions of the body involved directly affect only certain property owners or taxpayers; alternatively, the amount of land owned might be taken into account in determining the weight of a person's vote. See, *e.g.*, Ariz. Rev. Stat. Ann., Sec. 45–1207, providing for the dividing of drainage districts into "divisions as nearly equal in size as practicable," and that one di-

might be allowable even though the body's jurisdiction theoretically extends over the entire area and includes some citizens not affected in any direct way by the body's actions. On the other hand, it would seem that such an approach would be impermissible if the particular body, despite the narrow scope of its powers, had the authority to tax the citizens of the entire area generally. Such a susceptibility to taxation would appear to give all citizens a significant enough interest in that body's actions to warrant an equal voice for each—albeit some are more directly affected by the body's exercise of its other substantive powers.

In other words, since *Reynolds* assumes that all citizens are similarly situated *vis-à-vis* the body whose members are to be elected, where the contrary can be shown and where a districting plan is rationally and intentionally grounded on such a consideration, deviations from the equal-population principle may be permissible. This line of analysis does not

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rector of the body shall be elected from each such division; Sec. 45–1209 requires the ownership of real property on which taxes have been paid in order to vote in drainage district elections. Similarly, see also Ariz. Rev. Stat. Ann., Secs. 45–1517, 45–1612, relating to irrigation districts and providing for a like pattern with respect to districting—"as nearly equal in acreage as practicable"—and the qualifications of voters participating in the election of the directors of those bodies. In addition, it should be noted that it may violate the Due Process Clause if an attempt is made to tax property which is so situated geographically that it could derive no benefit from that taxation. See *Myles Salt Co.* v. *Board of Comm'rs of Iberia & St. Mary Drainage District*, 239 U.S. 478; *Thomas* v. *Kansas City So. Ry. Co.*, 261 U.S. 481.

mean that Reynolds is wholly inapplicable in this limited class of situations. Rather, it simply reflects the fact that that decision is grounded on the Equal Protection Clause, and that that constitutional provision, properly considered, may in some circumstances justify departures from a rigid rule of equality in population among districts as to at least some local bodies, *i.e.*, certain special districts.[67]

It might be suggested that the same sort of approach should be regarded as applicable to at least some general-function units as well. Indeed, in the instant case the Texas Supreme Court pointed out that the county board functions mainly in the rural areas of the county, while many of the governmental functions relating to the city residents are handled by the city council (see R. 149).[68] A similar argument was made in regard to the county board involved in the *Moody* case last Term. The short answer, in our view, is that virtually all general-function units in fact exercise powers which have a substantial impact on all citizens subject to their jurisdiction, wherever they reside within the area of the body's authority. The

[67] Such an approach would not, however, be pertinent to all special districts, since some of these units are multi-purpose in character and at least certain of their functions affect all citizens quite directly, and, as well, since the nature of some single-function special districts is such that all citizens should be regarded, *vis-à-vis* those bodies, as similarly situated (see *Sailors* Br. 19–21; 104–105). See generally Bollens, *Special District Governments in the United States* (1957).

[68] At a later point we discuss the question of the overlapping jurisdiction of local governmental bodies exercising general governmental functions (*infra*, pp. 65–70), and also consider the nature, powers and functions of the county board here involved (*infra*, pp. 58–60).

power to tax is a sufficient example: the traditional motto "no taxation without representation" seems to foreclose any argument that a citizen has no legitimate claim to an equal voice in choosing a governing board that can assess taxes on, and collect taxes from, him, wherever he might reside.

To be sure, some general-function units may have a more significant effect on one part of the citizenry—those living in rural areas, for example. But it is, as a general matter, merely a difference of degree. Moreover, any attempt to appraise how substantial a particular general-function unit's powers are in relation to citizens subject as well to the authority of another such unit seems quite impracticable.[69] While such an approach might be feasible as to special districts, it would seem to present insurmountable problems with respect to general-function units. And, at all events, a satisfactory alternative for dealing with the matter of overlapping jurisdiction appears to be available (see the discussion *infra*, pp. 69–70). Thus, it seems reasonable to conclude that, although some general-function units may have a somewhat different impact on some classes of citizens than on others, all of the citizens, wherever they reside within the jurisdiction, should nevertheless be regarded as having the same basic relationship to that sort of body. Thus, where the members of such a body's governing board are

[69] Some sort of quantitative determination in this regard—quite complex in nature—would seem essential before it could be decided whether a districting plan which deviated from population properly took into account the varying impact of the particular body on somewhat differently situated citizens.

elected from districts, the equal-population principle, we submit, should be held applicable, without further inquiry.[70]

[70] Similarly, school boards should be so regarded and treated, although in a sense special-function units, because of the significance of public education generally, the fact that all citizens provide financial support to the schools, and the like impossibility of determining, with any precision or exactitude, the manner in which school boards have a different impact on certain citizens. In our *Sailors* brief (pp. 103–104, n. 108), we attempted to delineate why a distinction as to applicability based on whether a general-function unit or a special-function unit was involved was, in our view, unsatisfactory, and why, in any event, school boards whose members are elected from districts should be covered by the equal-population principle. We recognize that an argument might be made that parents of school children constitute a class peculiarly concerned with school boards, and that a distinction between them and citizens generally might properly be taken into account in applying *Reynolds* to districting for elected school boards. But public education is hardly of interest only to the parents of children presently attending public schools (see *Sailors* Br. 98, n. 99). As stated by the Court in *Brown* v. *Board of Education*, 347 U.S. 483, 493: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." Nor is the interest of non-parents in public education only a general one. They, like parents, pay the taxes which support the schools.

IV

WHATEVER DISTINCTIONS MIGHT BE DRAWN AS TO APPLICABILITY OF THE EQUAL-POPULATION PRINCIPLE AT THE LOCAL LEVEL, THAT PRINCIPLE SHOULD CONTROL THE ELECTION OF THE COUNTY GOVERNING BOARD HERE INVOLVED

Even if some sort of functional approach is adopted in determining the applicability of the equal-population principle at the local level, or other distinctions in this regard are made, the county governing board whose districting scheme is at issue here should in any event be found within the ambit of that principle. As the discussion of the powers and functions of the Midland County Commissioners Court in the Statement (*supra,* pp. 4–7) plainly shows, that body exercises important governmental powers affecting all citizens of the county. If a legislative/administrative distinction is held pertinent, the county board here involved should be regarded as legislative in character, even though it apparently does not have the authority to enact ordinances, for it functions as a law-making body in a different, though analogous, manner. Significantly, the Commissioners Court has the power to tax all residents of the county—typically legislative action. It sits as a board of tax equalization in approving the assessments of property values, and expends funds for a variety of public purposes which concern the citizens of the county as a whole. It adopts a county budget, buys county equipment, lets contracts for the construction of public works, authorizes the sale and issuance of bonds, approves the expenditure of bond funds, deter-

mines the distribution of county road and bridge funds, condemns land, calls elections, canvasses election returns and appoints election officials. In addition, its statutory powers include the administration of the county's public welfare and public health services; the establishment of a county hospital, library, courthouse and jail; the appointment of various county officials and the filling of vacancies in elective positions (see *supra*, pp. 4–5).[71] Such an extensive panoply of powers cannot be regarded as insignificant or insubstantial.[72]

[71] In addition, county boards in Texas have the power to establish and change the districts from which the members of those bodies are elected (see *supra*, p. 6). Thus, compliance with a requirement to redistrict need be neither time-consuming nor cumbersome, since no constitutional amendment or even statutory enactment would be necessary (see *Sailors* Br. 113). Furthermore, this consideration points to the futility of assuming that any adjustment of the existing malapportionment might be achieved through the political process, without any judicial intervention (see *Reynolds*, 377 U.S. at 569–570). Indeed, efforts to have the Commissioners Court here involved change the districting so as to accord additional representation to those residing in the City of Midland met with failure (*supra*, p. 8; see R. 5–7).

[72] While there are undoubtedly county governing boards with more sweeping powers than this body (see *Sailors* Br. 8; 81–82, n. 77), it seems plain that its powers, whatever the manner in which exercised, have an important impact on and directly affect all the citizens of Midland County. Without stretching the concept unduly, it does not seem inappropriate to regard it as a "little legislature" (see *Sailors* Br. 16–19; 73). A significant factor in this regard is that Texas law prescribes that the members of that body are to be elected by all of the voters in the county. It is thus reasonable to assume that such a body is intended to be fairly representative of all of the electorate, and responsible and responsive to the county's voters as a whole. See Oden & Meek, County Reapportionment: A Rebuttal, 18 Baylor L. Rev. 15 (1966); compare Davis, *The Implications of Baker* v. *Carr on the County Commissioners Court of Texas*, 17 Baylor L. Rev. 41 (1965).

It cannot fairly be said that residents of the City of Midland have no real concern with the county board's actions, that the board is an essentially administrative body, or that its functions are basically ministerial ones.

Accordingly, it is impossible to accept the Texas Supreme Court's characterization of Commissioners Courts and its conclusion that the election of the commissioners is not governed by *Reynolds* because their legislative duties are "negligible" (R. 145).[73] Moreover, that is not the essence of the decision below. The real basis for the court's refusal to apply the

[73] It was in this context that the Texas court hastily dismissed any reliance on *Reynolds*, stating that the county board's "legislative functions are negligible and county government is not otherwise comparable to the legislature of a state or to the federal Congress where the 'one man, one vote' principle is asserted in its most exacting and compelling sense" (R. 145). What the court had in mind in terming the legislative functions of Texas county boards "negligible" is unclear, since it did not define what it would regard as legislative functions. That court also stated that "[t]he county is a subordinate and derivative branch of state government" (*ibid.*). That local governmental units are subordinate to State legislatures, derive their powers, in the main, from the legislatures, and are not sovereign, in the sense that the States are, are not, however, of constitutional significance in determining what requirements are placed on them by the Equal Protection Clause (see *Sailors* Br. 24–25; 39–40, nn. 43, 44).

equal-population principle[74] is revealed in the following passage from its opinion (R. 148–149):

> The basic problem of Texas counties in the respects under review is the extent of political power which the metropolitan areas should have in relation to the rural areas. * * * The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the

[74] At one point in its opinion, the Texas Supreme Court quoted at length the language in *Reynolds* rejecting the so-called federal analogy on the ground that political subdivisions, unlike States, were not sovereign entities (R. 145–146, n. 1, quoting from 377 U.S. at 575). For an explanation of the inclusion of this language and the reasons why any reliance thereon in support of the inapplicability of the equal-population principle at the local level is improper, see *Sailors* Br. 34–35, n. 37 (see also note 56, *supra*). Similarly, the Texas court's later apparent reliance (R. 150, n. 2) on *Tedesco* v. *Board of Supervisors of Elections for the Parish of Orleans*, 43 So. 2d 514 (La. Ct. App.), appeal dismissed, 339 U.S. 340, is misplaced, for the reasons developed in our *Sailors* brief (pp. 26–27).

> commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.[75]

In part, the court here seems to be espousing the view that rural residents should be favored and urban residents disfavored in the apportionment of seats on Texas county boards in order to achieve some kind of

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[75] Just prior to this quoted language, the Texas court had stated that "[t]he very fact of population concentration enables the city voters to elect county-wide officers," and that "the county commissioners court is not charged with the management and control of all of the county's business affairs [since] the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp" (R. 149). A similar situation of course existed in the State legislative cases, like *Reynolds*, with respect to officials elected Statewide, such as the Governor, Attorney General, and the like. Indeed, it was urged in those cases that this factor should be taken into account and should be accepted as a ground for giving rural areas more legislative representation than they would be entitled to if population alone were considered—since the urban areas had a disproportionate effect in electing Statewide officials, at least in States having urban majorities. The questionable assumptions about urban-bloc voting which this line of argument entails aside, the plain fact is that the Court in *Reynolds* flatly rejected this factor as a relevant one, and indeed made no mention thereof in its lengthy opinion (compare 377 U.S. at 564–568). It would seem, therefore, that the Texas court's suggestion that this factor is of some significance is not well founded.

"balanced" representation.[76] But that view seems foreclosed by *Reynolds* and its companion cases, where it was strenuously urged but rejected. Indeed, in *Reynolds* the Court clearly stated that "[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote" (377 U.S. at 567; see *id.* at 562–568, 579–580), and in *Davis* v. *Mann,* 377 U.S. 678, 692, the Court explicitly rejected the claim that the apportionment plan there at issue was "sustainable as involving an attempt to balance urban and rural power in the legislature."[77] Nor does the Court's reference in the *Dusch* opinion last Term to "a detente between urban and rural communities" (387 U.S. at 117) indicate that rural overrepresentation at the local governmental level, as distinguished from the State legislative level, is, as a general matter, constitutionally permissible. Rather, that language must be read against the background of the factual situation there presented—consolidation of formerly separate local units (see note 51, *supra,* and generally *supra,* pp. 35–38). In short, insofar as the decision below is grounded on an urban/rural dichotomy, it is wholly inconsistent with this Court's previous determination that such balancing is impermissible in the apportionment context.

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[76] Indeed, the testimony of the present commissioners makes clear that the purpose behind the existing districting arrangement was to ensure perpetuation of rural control of the county board (see note 27, *supra*), and the trial court so found (R. 132).

[77] See also the Court's reference in *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 674, n. 19, to "the existence of a rural stranglehold on the legislature in Maryland * * *" (see generally *Sailors* Br. 81–82; 90, n. 90).

There is, however, another thread in the Texas Supreme Court's opinion—that Texas county boards do not take actions which importantly affect urban areas, and that it is, for that reason, proper to give the rural areas a more significant voice on these bodies than that to which they would be entitled were population alone considered. But the Texas court itself noted that "[t]heoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county" (R. 149). And a mere listing of the powers of the Commissioners Court makes it clear that it does have a substantial impact on the residents of the City of Midland, and that some of its actions do concern and affect them very directly (see the discussion *supra,* pp. 58–60). Of considerable significance, in our view, is the fact that the county board has the statutory power to tax and assess property located in the city, and exercises that power in a most active way. Indeed, under the districting plan now in effect, approximately 61 percent of the assessed valuation of all taxable property is located in Precinct No. 1, which includes all of the city residents.[78] One

[78] In addition, it was alleged that the county board members, "acting as the Board of Equalization of Midland County, have and will continue to value for State and County tax purposes all taxable property in Commissioners' Precincts No. 2, No. 3, and No. 4 at an average of approximately 8% of its fair market value and all taxable property in Commissioners' Precinct No. 1 at an average of approximately 18% of its fair market value" (R. 11).

of the district court's findings was that "taxable values * * * were grossly disproportionate among [the] Commissioners' Precincts" of Midland County (R. 131), and this was implicitly acknowledged by the Texas Supreme Court's inclusion of "taxable values" among the "relevant factors" which it said should be considered in fashioning a revised districting plan (R. 149). In short, in the face of the county board's general powers, and particularly its power to assess and tax all county property, and the fact that this power can be exercised to the serious disadvantage of the city residents, it is difficult to accept the Texas Supreme Court's conclusion that that body's "major responsibilities" are limited "to the nonurban areas of the county" (R. 149).

But the Texas Supreme Court's opinion does raise what might be termed, for want of a better phrase, the overlapping jurisdiction situation. Thus, the court below stated that the "important affairs of the county administered by the commissioners court * * * disproportionately concern the rural areas," and that "the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers" (R. 149). While the Texas court appears to understate significantly the impact of the county board's actions on city residents, the situation it describes is hardly a unique one. Indeed, it is a commonplace of local government in this country for two general-function units

—usually a county and a city—to have jurisdiction which is coincident as to some of the same geographical areas. An aspect of this overlap in authority is that, as a general matter, the cities have municipal government structures which perform certain of the functions which the county governments perform in the unincorporated areas. Conversely, the county governments often do not exercise the full sweep of their powers in the urban areas, because of the existence of municipal governments in those areas. Indeed, since certain problems are unique to urban areas, city councils may have powers which county boards are not generally authorized to exercise.[79] In light of these considerations, it has been asserted that "when governmental functions are divided between two bodies in the same geographical area—county and city—the recognition of such elements as the differing stake of urban and rural citizens may be relevant." [80]

In an overlapping jurisdiction situation, then, it may reasonably be questioned whether county and city

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[79] This is of course a somewhat oversimplified generalization, and account should be taken of the recent move toward urban counties in large metropolitan areas which exercise virtually all the powers of local government and the growth of county home rule in various parts of the country (see generally Final Report of the Commission on Intergovernmental Relations, H. Doc. No. 198, 84th Cong., 1st Sess. 53–54 (1955); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 (1965); *Sailors* Br. 16–19).

[80] Note, *Reapportionment*, 79 Harv. L. Rev. 1228, 1277 (1966), which further notes "the different degrees of political responsibility a county board may have to its urban and rural constituents" (*ibid.*). See also *Hanlon* v. *Towey*, 142 N.W. 2d 741, 747 (Minn.), and Note, 11 S. Dak. L. Rev. 386, 395 (1966).

residents are similarly situated and "stand in the same relation regardless of where they live" (*Reynolds*, 377 U.S. at 565). Indeed, if there were a practical way of assessing and reflecting the somewhat greater interest of the rural inhabitants in the actions of a county governing board, it would not seem improper to do so. But the fact is that there are no available tools for measuring that difference of degree, nor any rational method of giving it effect (see the discussion *supra*, pp. 55–57). The choice, then, in the overlapping jurisdiction situation, is between giving the city dwellers an equal voice in county affairs—albeit their interest is lesser—or, by holding *Reynolds* inapplicable, allowing them to be deprived of any voice at all.[81] Confronted with these

[81] A like situation was presented in the *Moody* case which the Court decided last Term without reaching the merits (387 U.S. 97; see *supra*, p. 27). There it was argued that the county board's powers—which, though probably less significant, in some respects parallel those of the body here involved—related primarily to the rural areas of the county. There—like here—a populous urban area, with a municipal government structure, was located within the county board's jurisdiction. In *Moody* the disparities from population-based districting were not as extreme as here; there 61 percent resided in one district, here 97 percent are so situated. Here, like in *Moody*, it is clear that "[t] he services performed by the Board are, under the legislation establishing its authority, intended for the benefit of all residents of the county," and "taxes which support such services are paid by all county residents without regard to the district of residence" (*Sailors* Br. 82). In regard to the body involved in *Moody*, Judge Johnson, in his dissenting opinion in that case, stated (256 F. Supp. 195, 201): "These boards of revenue perform important governmental functions, and are designed to be controlled by the voters over which they have jurisdiction. The exercise of their powers, which include the important powers to levy and collect taxes, to spend for a variety of governmental and public purposes, and to establish, change, discontinue, and repair

alternatives, we think it clear that the Equal Protection Clause compels equal representation for all citizens affected.

That is plainly the fairer result, we submit, with respect to general-function units. Indeed, whatever the special responsibilities a county board discharges for the exclusive benefit of the rural inhabitants, it also performs functions which have an important impact on city dwellers as well. This is especially clear where the county government exercises power to tax everyone in the territory, including the residents of the city. That, of course, is the case here. We conclude that so long as the Midland County Commissioners Court performs important governmental functions which significantly affect the city residents—and has a general taxing authority over them—the equal-population principle applies and requires that districting for seats on that body be based on population.[82]

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roads, materially and substantially affects the lives, property, and welfare of the citizens [of the county]."

[82] We took the same position in the *Moody* case last Term, which involved a similar situation (see note 81, *supra*). We there said (*Sailors* Br. 82–83):

"* * * Malapportionment of the county board cannot be justified on the ground that overlapping or additional services are provided by the city—paid for, of course, by the residents of Dothan. There is, of course, no constitutional prohibition on a governmental unit's being organized with sole responsibility and taxing authority outside the city limits of Dothan. But, so long as the Board exercises general authority over the whole county, and taxes accordingly, there is no justification for deviation from population-based districting."

To a somewhat lesser extent, the *Sailors* case also presented an overlapping jurisdiction situation, since both the county school board and the local school districts performed certain functions in regard to education in the same geographical

This result may appear a harsh one in the instant case because the sparsity of population in the rural areas could well result in depriving those who live there of any effective voice if population-based districting is required.[83] Yet, on the other hand, the degree of disparity between the number of rural and urban inhabitants accentuates the unfairness of allowing majority control of the county board to reside in rural hands.[84] But the problem is not unavoidable, as

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area—the county board throughout the county and the local ones within their respective district. No such situation is presented as to county or other local school boards which are the only local governmental bodies performing educational functions in the geographical area within their jurisdiction, however, such as those involved in the *Strickland* and *Delozier* cases (see note 59, *supra*).

[83] Of course, nothing prevents those living in the rural areas from seeking election to the county board from whatever revised districts are prescribed, and it is doubtful that the city dwellers would complain greatly if the rural areas were given one seat on the body, although this would not be in strict accord with the equal-population principle, since then, at least, the rural areas would not have majority control of the board. Perhaps if a body's powers over the overlapped area are plainly insignificant and wholly unimportant, the residents in that area might properly not be taken into account in arranging districts for the election of that body's members. In any event, that is plainly not the situation in Midland County.

[84] Indeed, a significant feature of the instant case is just how egregious the disparities from population-based representation are. A majority—three of the four who are elected—of the commissioners are elected from districts containing less than three percent of the people and voters; the remaining 97 percent are represented by a single commissioner. And, under the districting plan currently in effect, the maximum population-variance ratio is approximately 164 to 1 (see R. 8). Certainly such figures are rougher and less meaningful, because of the small size of the bodies involved at the local level, than in the State legislative cases (see *Sailors* Br. 62). But there is no blinking the fact that, under any sensible test, the county board is grossly malapportioned.

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a political matter. Indeed, if it seems incongruous to have the city dwellers—who have their own municipal body—dominating a county government with primarily rural functions, that may argue for eliminating the overlap by a partial or total division of jurisdiction (see note 82, *supra*). Perhaps the Midland County Commissioners Court could be relieved of all powers over the city residents—in which event it could remain under the control of the rural inhabitants. But since the county board presently has the power to affect importantly the lives of the residents of the City of Midland, they are entitled to equal representation on that body.[85] Thus, the Texas Supreme Court's determination that the equal-population prin-

[85] We recognize that the Texas Supreme Court found the existing districting scheme arbitrary and lacking a rational basis. But that determination was grounded basically on State constitutional grounds (see *supra*, pp. 14–15), and its decision does not substantially remedy the existing malapportionment. Thus, the Texas court expressly sanctioned "a rational variance from equality in population" among the districts based on "additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values" (R. 149–150). A similar approach was urged to the Court in the State legislative cases—at least as to the relevance of "land areas" and "geography"—and it is beyond doubt that such factors were found irrelevant by the Court in *Reynolds* (see 377 U.S. at 562–580). With respect to the "number of qualified voters" factor, the percentage of the county's qualified voters residing in the disfavored Precinct No. 1 has consistently been slightly higher than the percentage of the county's population residing there—both in excess of 97 percent (see R. 7–9). As to "taxable values," approximately 61 percent of the assessed valuations of taxable property is located in Precinct No. 1, although the residents of that area elect only one of the four county commissioners.

ciple of *Reynolds* is inapplicable is, in our view, an erroneous one and requires reversal by this Court.

Several other matters deserve brief comment. Considerable concern was expressed at the oral argument last Term about the large number of bodies potentially affected by a holding that *Reynolds* applies at the local governmental level, and about the volume of litigation which might ensue from such a decision. The relevance of that consideration aside, we reiterate our belief that the problem is judicially manageable (see *Sailors* Br. 107–116). Indeed, the decisions last Term in *Moody* and *Bianchi* contribute to that end since, under the Court's narrow reading of 28 U.S.C. 2281 in those cases, three-judge courts will not be convened, as a general matter, in local government apportionment cases, and direct appeals to this Court will be infrequent (see *Sailors* Br. 113–116), thus promoting economy in the federal judicial system.

We also recognize the concern expressed by the Court in the *Sailors* and *Dusch* opinions with maintaining flexibility and opportunity for experimentation in governmental organization at the local level (387 U.S. at 109–111, 117). But innovation will not be stifled if *Reynolds* is applied at the local level; on the contrary, such a holding may even stimulate new developments, albeit within a proper constitutional framework. What is more, most of the existing districting arrangements at the local level which are not grounded on population are hardly the product of in-

novation or experimentation. Rather, they have resulted from a concerted effort to resist change—to maintain the *status quo*—against pressures for adjustment to reflect new and different conditions and circumstances. It would be a cruel irony to preserve them in the hope that change may someday come.

A veritable groundswell of litigation on the constitutional question here at issue amply demonstrates that the constitutional rights sought to be effectuated are important ones. Sound policy considerations support the resolution the government urges (see *Sailors* Br. 63–72). A holding that the equal-population principle applies at the local level will avoid seriously limiting the reach and import of *Reynolds,* and will avert the creation of a constitutional anomaly of considerable proportions.[86] What is sought here is a decision taking the final step in the process begun with *Baker* v. *Carr*. As a practical matter, that step is an important one; as a constitutional matter, it is not a large one. In the government's view, it is one which, at all events, the Court should take.[87]

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[86] Of course, a contrary holding will also undercut those progressive State courts which have applied *Reynolds* in a logical manner without waiting for explicit direction from this Court (see note 37, *supra;* see also *Sailors* Br. 61).

[87] No question relating to the propriety of proportional representation schemes is involved in the instant case; nor does the government view the position we urge—a holding that the equal-population principle of *Reynolds* applies generally to local governmental bodies—as precluding the consideration, in an appropriate case, of whether certain such arrangements are consistent with the principles laid down in *Reynolds* and related cases (see, *e.g.*, *People ex rel. Engle* v. *Kerner*, 205 N.E. 2d 33, 35 (Ill.), cited with approval in *Scott* v. *Germano*, 381 U.S. 407, 408–409; *Blaikie* v. *Power*, 193 N.E. 2d 55 (N.Y. Ct. App.),

CONCLUSION

For the reasons stated, the judgment of the Texas Supreme Court should be reversed and the cause remanded with directions to reinstate the judgment and order of the district court.

Respectfully submitted.

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OCTOBER 1967.

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appeal dismissed, 375 U.S. 439). Nor is there any need here to consider the propriety of weighted voting (see *Sailors* Br. 79–80), or remedial devices generally; as stated in our *Sailors* brief (pp. 116–118), the approach outlined in *Reynolds* and later decisions in regard to questions of relief in apportionment cases provides a workable framework in this regard and applies equally to local governmental as well as State legislative cases.

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No. 39

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HANK AVERY,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF OF RESPONDENTS

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SUBJECT INDEX

	Page
Opinions Below	1
Question Presented	2
Statement	3
Argument	7
I The Judgment of the Supreme Court of Texas	7
II The Commissioners Courts of Texas	9
III Reynolds v. Sims—One Man, One Vote	13
IV Amicus Curiae Brief of the United States	25
Conclusion	31

Page

Baker v. Carr, 369 U.S. 186, 235-236, 82 S. Ct. 691, 719-720, 7 L. Ed. 2d 663 (1962) 8, 16, 18, 20

Black Bros. v. State, 253 S.W. 576 (Tex. Civ. App. 1923) re'd on another point, 116 Tex. 615, 297 S.W. 213 (1927) 10

Board of Laramie v. Board of Albany, 92 U.S. 307, 23 L. Ed. 552 17

Breedlove v. Settles, 302 U.S. 277, 58 S. Ct. 205 (1937) 17

Butcher v. Bloom, 415 Pa. 438, 203 A. 2d 556 (1964) 8

Dusch v. Davis, 386 U.S. ....., 87 S. Ct. 1554, 1556 (1967) 15, 27

Gaines v. Newbrough, 12 Tex. Civ. App. 466, 34 S.W. 1048 (1896) 10

Glass v. Hancock County Election Commission, 378 U.S. 558, 84 S. Ct. 1910 (1964) 16, 18

Greenburgh, Town of, v. Board of Supervisors, 157 N.Y. Law J. No. 29, p. 18 (February 3, 1967) 21

Haverbekken v. Coryell County, 112 Tex. 422, 247 S.W. 1086 (1923) 10

Higginbotham v. Baton Rouge, 306 U.S. 535, 59 S. Ct. 705 (1939) 17

Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 28 S. Ct. 40, 52 L. Ed. 151, 1907 ..... 8, 17

Jackman v. Bodine, 43 N. J. 453, 473, 205 A. 2d 713, 724 (1964) 8

Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40 (1956) 8

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911) 15

Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 743, 84 S. Ct. 1459, 1477 (1964) 15, 20

Mason v. Missouri, 179 U.S. 328, 21 S. Ct. 125 (1900) 17

Miller v. Brown, 216 S.W. 452 (Tex. Civ. App. 1919) 10

Minor v. Happerset, 21 Wall 162, 22 L. Ed. 627 17

Page

Mobile County v. Kimbie, 102 U.S. 691, 266 L. Ed. 238 17

McGowan v. State of Maryland, 366 U.S. 420, 81 S. Ct. 1101 (1961) 15

Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 1388, 12 L. Ed. 2d 506 (1964) 3, 8, 13, 14, 16, 20, 26

Sailors v. Board of Education of County of Kent, 386 U.S. ....., 87 S. Ct. 1549, 1553 (1967) 12, 14, 26

Scott v. Germano, 381 U.S. 407, 85 S. Ct. 1525 (1965) 7

Scranton v. Pew, 379 U.S. 40, 85 S. Ct. 207, 13 L. Ed. 2d 107 (1964) 8

Soliah v. Heskin, 222 U.S. 522, 32 S. Ct. 103 (1912) 17

Tedesco v. Board of Supervisors, 339 U.S. 940, 70 S. Ct. 797 (1950) 16, 18

The Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S. Ct. 1429 (1964) 8

Von Rosenberg v. Lovett, 173 S.W. 508 (Tex. Civ. App. 1915) 10

Williams v. Castleman, 112 Tex. 193, 247 S.W. 263 (1922) 10

Williamson v. Lee Optical, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955) 15

Texas Constitution:

Article I, Section 3 7

Article V, Section 18 4

Constitution 1866, Article IV, Sec. 17, 3 Vernon's Texas Constitution 613 9

Constitution 1869, Article V, Sections 19, 20 and 21, 3 Vernon's Texas Constitution 659 9

Constitution 1876, Article V, Sections 1 and 18, 2 Vernon's Texas Constitution 3 9

Texas Revised Civil Statutes, 1925:

Title 44, Article 2339, et seq. 10

79 Harvard L. Rev. 1228, 1272, *Reapportionment* 18, 23

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinions of the Supreme Court of Texas are reported at 406 S.W. 2d 422. They appear in the Record from pages 141 through 159. Certain findings of the trial court are referred to and made a part of the decision of the Texas Supreme Court. This constitutes the relevant record of the proceedings in the Texas courts which is before this Court.

QUESTION PRESENTED

The question presented is whether there necessarily will be an invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution if the Commissioners Precincts of Midland County, Texas are not redistricted solely upon the basis of population.

The Federal *question is limited to whether there necessarily* will be an "invidious discrimination" against Petitioner if the Commissioners precincts of Midland County, Texas are redistricted for "the convenience of the people" upon consideration of population and such additional factors as number of qualified voters, land areas, geography, and miles of county roads and taxable values, as already ordered by the Supreme Court of Texas.

The Federal posture of the case is thus limited.

The question is not that posed by Petitioner, whether the Fourteenth Amendment's Equal Protection Clause permits the continuation of the practice of the Commissioners Court of Midland County to divide the county into precincts so grossly disproportionate in population that less than five per cent of the county's total population elects a majority of the members of the Commissioners Court. That question has been settled by the Texas Supreme Court.

The question is not that posed by Petitioner, whether the principle of "one man—one vote," claimed to have been

enunciated in *Reynolds v. Sims*,[1] is applicable to the election by precinct of the members of the governing body of Midland County, Texas. The issue here joined between the real parties to this cause concerns only the division into precincts of Midland County, Texas by the Commissioners Court pursuant to the remand and directions of the Texas Supreme Court.

The question to be decided should not properly be that submitted by the United States as amicus curiae, whether the equal population principle enunciated in *Reynolds v. Sims* and other cases involving State legislative apportionment is applicable as well to the district-based election of members of the governing bodies of local units of government. The issue here for decision is whether Petitioner has yet made any showing of "invidious discrimination" by reason of remand of the case to the Texas trial court for division of the county for convenience of all the people upon consideration of *all* relevant factors, including population.

STATEMENT

The facts of this case may not be simple but they are clear.[2] They are fixed and settled between the parties to this cause by the opinions of the Texas Supreme Court and those findings of the Trial Court included therein (R. 141-159). They are correctly stated *in part* in the Statement of Petitioner (Pet. Br. 3-6) and the Statement of the *amicus* (U.S. Br. 3-16).

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[1] *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

[2] "The facts in this case are simple and clear," says Petitioner (Pet. Br. 5).

1. Article V, Section 18 of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people * * * into four commissioners' precincts in each of which there shall be elected by the qualified voters thereof one county commissioner * * *." (R. 141).

2. Midland County was last redistricted by order of its Commissioners Court of August 31, 1963, effective January 1, 1964. The Texas courts have recognized Petitioner as a resident property owning, tax paying citizen authorized to attack the division and to seek a redistricting of the county (R. 144).

3. At all relevant times, Midland County, Texas had a population of approximately 70,000 persons. In excess of 95% of the population resided in Commissioner's Precinct No. 1, and the remaining population of the county was disbuted among the other three precincts. Ninety-seven percent of the qualified voters of the county resided in Commissioner's Precinct No. 1 and the remaining qualified voters were distributed among the other precincts. And at all relevant times other pertinent factors, such as roads, land area and taxable values of the county, were grossly disproportionate among the Commissioners Precincts of the county (R. 142).

4. At all relevant times the county could have been divided into Commissioners Precincts on a basis or plan taking into proper account population, number of qualified voters,

land area, taxable values and other pertinent factors which would have been practical and for the convenience of the people (R. 142).

These facts are argued in some detail by Petitioner and the *amicus*. These facts refer to Petitioner's complaint of rural domination of the Commissioners Court, and are irrelevant here since such domination has been effectively ended by the decision of the Supreme Court of Texas. It is more important to recite and remember tthe other facts and local law stated by the Texas Supreme Court.

(1) Midland County is a subordinate and derivative branch of the government of Texas (R. 145).

(2) The county's legislative functions are negligible (R. 145).

(3) The terms "convenient" and "convenience of the people" appearing in Article V, Section 18 of the Texas Constitution, give the Commissioners Court "some discretion to meet the 'changing needs of the people' but such must be 'exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion'" (R. 148).

(4) The very fact of population concentration in the city will enable the city voters to elect the county-wide officers (R. 149).

(5) The voice of the citizens of the rural areas will be lost for all practical purposes if the Commissioners Precincts of the county are apportioned solely on a population basis (R. 149).

(6) Important affairs of the county administered by the Commissioners Court—such as roads, bridges, taxable values of large lands areas—disproportionately concern the rural areas (R. 149).

(7) Developments during the years have greatly narrowed the scope of the functions of the Commissioners Court and limited its major responsibilities to the non-urban areas of the county, that is, the city government is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers (R. 149).

(8) There was arbitrariness in the districting order of Midland County, Texas of August 31, 1963 because of the malapportionment of the Commissioners Precincts, and the precincts can and must be redistricted to eliminate such discrimination (R. 150).

That the order of the Commissioners Court of Midland County, Texas of August 31, 1963 is grossly disproportionate in population as claimed by Petitioner and found by the Texas Supreme Court and emphasized by the *amicus* is no longer an issue between the parties to this cause. That issue has been decided by the Texas Supreme Court.

There can be no finding by this Court that the plan afforded by the Texas Constitution and implemented by the judgment of the Texas Supreme Court reflects "no policy, but simply arbitrary and capricious action or inaction." For here there is a decision by the Texas Supreme Court which

promises to assure fair representation and vote to all persons and all segments of the state's society, with proper consideration of the whole population.

ARGUMENT

I *The Judgment of the Supreme Court of Texas*

The judiciary of the State of Texas has taken jurisdiction of this cause to require a valid redistricting of Midland County, Texas. The Supreme Court of the state has recognized the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as the requirements of the equal rights or equal protection clause of Article I, Section 3 of the Texas Constitution. The Texas court has ordered that Midland County be redistricted in conformity with both the Constitution of the United States and the Constitution of the State of Texas, with a rational variance from strict equality in population in the Commissioners Precints if justified by additional factors relevant in consideration of the particular function performed by the various local governmental bodies.

In *Scott v. Germano*, 381 U.S. 407, 85 S. Ct. 1525 (1965), involving apportionment of the Illinois Senate the Court stayed the hand of the lower courts, and declared:

> "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."

In *The Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 84 S. Ct. 1429 (1964), involving the apportionment of seats in the Maryland Senate, this Court said:

> "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."[3]

The Texas Supreme Court has found no invidious discrimination by reason of division of the Texas counties into commissioners precincts for convenience of the people upon consideration of various factors peculiarly relevant thereto. The Texas court has concluded that the Federal Constitution's Equal Protection Clause does not require in *all* cases a division of the counties *solely* upon a population basis. If this conclusion be correct, *as argued by Respondents*, then the action heretofore taken by the judiciary of Texas is to be encouraged by dismissal of these proceedings or denial of the petition for writ of certiorari, and, in any event, affirmance of the State court's judgment.

II *The Commissioners Courts of Texas*

In Texas the county is a body corporate and politic, a political subdivision, a subordinate and derivative branch of State government (Pet. Br. 7; Tex. S. Ct. op. R. 145).[4]

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[3] Also see *Scranton v. Dew*, 379 U.S. 40, 85 S. Ct. 207, 13 L. Ed. 2d 107 (1964), citing *Butcher v. Bloom*, 415 Pa. 438, 203 A. 2d 556 (1964); *Jackman v. Bodine*, 43 N.J. 453, 473, 205 A. 2d 713, 724 (1964). See also *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (1956), and discussion thereof in *Baker v. Carr*, 369 U.S. 186, 235-236, 82 S. Ct. 691, 719-720, 7 L. Ed. 2d 663 (1962).

[4] Also see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 28 S. Ct. 40, 52 L. Ed. 151 (1907); *Reynolds v. Sims*, 377 U.S. 533, 575, 84 S. Ct. 1362, 1388, 12 L. Ed. 2d 506 (1964).

The constitutional and statutory jurisdiction and authority of the Commissioners Courts of the Texas counties is historical. They have enjoyed a constitutional status for more than one hundred years. Constitution 1866, Article IV, Section 17, 3 Vernon's Texas Constitution 613; Constitution 1869, Article V, Sections 19, 20 and 21, 3 Vernon's Texas Constitution 659; Constitution 1876, Article V, Section 1 and 18, 2 Vernon's Texas Constitution 3.

Under each of these Texas Constitutions, the Commissioners Court is provided for as a party of the judicial machinery of the State. In each of such Constitutions Article I consists of a Bill of Rights. Article II declares in each instance that the powers of Government are to be divided into three distinct departments: namely, legislative, executive and judicial. In each instance the three succeeding Articles provide for the officers and bodies who are to exercise the legislative, executive and judicial functions, respectively. The provisions concerning the Commissioners Court in the Constitution of 1866 are found in "Article IV Judicial Department." The provisions concerning the Commissioners Court in the Constitution of 1869 are found in "Article V Judicial Department." The provisions concerning the Commissioners Court in the Constitution of 1876 are found in "Article V Judicial Department." It is clear that the framers of the Texas Constitutions during the last one hundred years have conceived of the Commissioners Courts of the several counties as an integral part of the Judicial Department of State Government.

The classification of the Commissioners Courts as a part of the machinery of the Judicial Department of the State is carried out by the scheme of organization of the Texas Revised Civil Statutes, 1925, as amended. It will be noted that the basic provisions for the organization and functions of Commissioners Courts are contained in Title 44, Texas Revised Civil Statutes, Articles 2339, et seq. It is significant that Title 44 is contained in the following sequence of Titles of the Revised Civil Statutes, to wit:

Title 37 Court—Supreme
Title 38 Courts of Criminal Appeals
Title 39 Courts of Civil Appeals
Title 40 Courts—District
Title 41 Courts—County
Title 42 Courts—Practice in District and County
Title 43 Courts—Juvenile
Title 44 Courts—Commissioners
Title 45 Courts—Justice

Further, the courts of Texas have, through a long line of decisions, held that the Commissioners Court is a court, though there is conflict as to whether the court is one of general jurisdiction or af special and limited jurisdiction with only specially delegated powers.[5]

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[5] *Haverbekken v. Coryell County*, 112 Tex. 422, 247 S.W. 1086 (1923); *Black Bros. v. State*, 253 S.W. 576 (Tex. Civ. App. 1923), re'd on another point, 116 Tex. 615, 297 S.W. 213 (1927); *Gaines v. Newbrough*, 12 Tex. Civ. App. 466, 34 S.W. 1048 (1896); *Miller v. Brown*, 216 S.W. 452 (Tex. Civ. App. 1919); *Von Rosenberg v. Lovett*, 173 S.W. 508 (Tex. Civ. App. 1915); *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263 (1922).

The Texas Commissioners Court has various functions as a court:

1. By statute it has regular terms at fixed times at designated places;

2. Its finding and orders are, with few exceptions, accorded finality;

3. It has power to issue all notices, citations, writs and process as may be necessary for the proper execution of its powers and duties;

4. It has power to punish contempts by fines;

5. The commissioners are not liable civilly for any act done by them as such when the tribunal has color of jurisdiction; and

6. If the body has jurisdiction of the matter, then the lack of merit of the claims and want of proper form does not impair its jurisdiction and authority to pass upon the claims and allow or reject them.

The Texas Supreme Court has said in this cause that the appellation "court" is a misnomer in the accepted meaning of the designation (R. 145). Strictly speaking this is correct because, although it is created and labeled as a court in the Texas Constitution and in many of the Texas statutes, many of its functions are administrative. This is pointed up in the Argument of Petitioner and the various Texas statutes copied in the Appendix to Petitioner's Brief (Pet. Br. 8-11, Appendix 6-41).

As shown in Petitioner's Brief and the statutes appended thereto, the Texas Commissioners Court has the authority to adopt a budget for all county expenditures and to set the salaries of all county officials, to make purchases for the county and to lease or sell the county's property, to settle the debts of the county, to own and operate the county's courthouses, jails, auditoriums, hospitals, libraries, airports, cemeteries and garbage dumps. The Commissioners Court of Texas is to prepare the annual budget and levy taxes for general county purposes. As a practical matter this is the same authority recognized in the County Board of Education of Michigan in *Sailors v. Board of Education of County of Kent*, 386 U.S. ...., 87 S. Ct. 1549, 1553 (1967), where it was pointed out by this Court that the authority of the county board included the appointment of a county school superintendent, "*preparation of an annual budget and levy of taxes*," "distribution of delinquent taxes," employment of teachers, and establishment of a school for children in juvenile homes. And yet there, the Court declared:

> "We need not decide at the present time whether a State may constitute a local legislative body through the appointive rather than the elective process. We reserve that question for other cases such as Moody v. Flowers (Board of Supervisors v. Bianchi), 386 U.S. ....., 87 S. Ct. 1544, which we have disposed of on jurisdictional grounds. We do not have that question here, *as the County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense.*"

In consideration of the similar authority of the Commissioners Courts and persumably on much the same reasoning, in this case the Texas Supreme Court has found and declared as a matter of local law and fact:

> "The primary function of the commissioners court is the administration of the business affairs of the county * * *. Its legislative functions are negligible * * *."

We argue, therefore, that the Texas Commissioners Court is a judicial and administrative body. Its functions are essentially judicial and administrative. It can not be properly classified as a legislative governmental unit.

III *Reynolds v. Sims*—One Man, One Vote

It may be admitted — over stifled objection — that the Fourteenth Amendment applies to the State and to every governmental agency or instrumentality of the State which exercises power delegated to it by the State. It may be admitted — without qualification — that the county is a governmental instrumentality or division of the State and the Commissioners Court is the administrative body of the county, which exercises powers delegated to it by the State. However, it does not follow that the State may exercise its powers only in a body apportioned on a population basis. Merely because State legislators must be elected on a basis of equal apportionment is not meant that their agents must be chosen on the same basis.

We would start with the opinion of the Court in *Sailors v. Board of Education of County of Kent*, 386 U.S. ...., 87 S. Ct. 1549, 1551 (1967), in which the Court itself started with *Reynolds v. Sims:*

> "We start with what we said in Reynolds v. Sims, supra, at 575, 84 S. Ct. at 1388:
>
> > " 'Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 28 S. Ct. 40, 52 L. Ed. 151, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them," and the "number, nature and duration of the powers conferred upon (them) * * * and the territory over which they shall be exercised rests in the absolute discretion of the state." ' "
>
> "A State cannot of course manipulate its political subdivisions as so to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race * * *. Yet as stated in Anderson v. Dunn, 6 Wheat. 204, 226, 5 L. Ed. 242:
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> > " 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion applied to the exigencies of the state as they arise. It is the science of experiment.' "

To state the true test — and not merely repeat by rote the one man, one vote argument—we continue with *Dusch v. Davis*, 386 U.S. ...., 87 S. Ct. 1554, 1556 (1967):

> "But on the assumption that Reynolds v. Sims controls, *the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination.* 377 U.S., at 561, 84 S. Ct. at 1381."[8]
>
> "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is reversed."

The Equal Protection Clause is not an algebraic formula. Equal protection does not rest on whether each and every man has one vote. The question is not whether the practice assailed "results in some inequality" but rather on whether "any state of facts reasonably can be conceived that would sustain it." In other words, one who attacks the practice must show "that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911); *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 743, 84 S. Ct. 1459, 1477 (1964).

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[8] "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955).

"* * * the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101 (1961).

Both prior and subsequent to *Baker v. Carr*[7] and *Reynolds v. Sims*,[8] the Court has refused to review State court decisions upholding "rational" methods of districting for municipal bodies, even when it was argued that the voting power of citizens in one district was diluted because another district with a substantially smaller population could elect the same number of representatives to the local governing board.

Despite the strenuous efforts of Petitioner and the United States to explain them away, the rulings of this Court on the petitions for Writ of Certiorari in *Tedesco v. Board of Supervisors*, 339 U.S. 940, 70 S. Ct. 797 (1950), and *Glass v. Hancock County Election Commission*, 378 U.S. 558, 84 S. Ct. 1910 (1964) are clear and definitive rulings to the effect that the Fourteenth Amendment does not require equality of population as between precincts, districts or other subdivisions for the election of officials for local governmental subdivisions.

In *Tedesco v. Board of Supervisors*, the plaintiffs protested the population disparity in the New Orleans City Council election district and claimed that this disparity deprived them of their Fourteenth Amendment rights. The Louisiana court held that, since the right to vote for municipal officers was granted by the State, the State could regulate that right in any "rational" manner. Thus, the question was pointedly raised and expressly overruled by

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[7] *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962).

[8] *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

the Louisiana Supreme Court in its opinion, reported at 43 So. 2d 514, 517. The constitutional question was submitted to this Court, and ruled on in the notation dismissing the appeal as follows:

> "PER CURIAM. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

It appears to us that the authorities on which the *Tedesco* appeal was dismissed were *Soliah v. Heskin*, 222 U.S. 522, 32 S. Ct. 103 (1912); *Board of Laramie v. Board of Albany*, 92 U.S. 307, 23 L. Ed. 552; *Mobile County v. Kimbell*, 102 U.S. 691, 26 L. Ed. 238; *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40 (1907); *Higginbotham v. Baton Rouge*, 306 U.S. 535, 59 S. Ct. 705 (1939); *Minor v. Happerset*, 21 Wall 162, 22 L. Ed. 627; *Mason v. Missouri*, 179 U.S. 328, 21 S. Ct. 125 (1900); and *Breedlove v. Settles*, 302 U.S. 277, 58 S. Ct. 205 (1937). The principle of these cases is that, in the Federal system, the states have absolute control over their political subdivisions and municipal corporations and the officials who serve them. Without any compulsion from the Federal government and under no constitutional restraints, the states may create as many or as few subdivisions and municipal corporations as they please, or whatever size or shape. The states may abolish or merge them at will, provide for the selection of their officials by appointment, election, or in any other manner, or abolish the offices altogether.

We argue that there is quite a difference in the duties and responsibilities which the States owes to its citizens under the restrictions of the Fourteenth Amendment as

pertain to legislative officials, and those which it owes as pertaining to *local* judicial and *administrative officials.* While the State is required by the Fourteenth Amendment to accord equal treatment to its citizens by giving each an equal voice in the selection of the legislators who make the laws which govern the people, the cases above cited hold that the State is under no constitutional obligation to see to it that the counties and cities created by it are equal in size or shape, or that the officials of those counties and cities are equally or proportionately distributed, or that the districts or precincts within those counties or cities are equal in area, population, or any other regard. The requirement that the State distribute its legislators equally among the people just does not and should not apply to its judicial and admininstrative agents and officials.

The Court did not overrule the *Tedesco* case in 1962 in *Baker v. Carr.* Writing for the court, Mr. Justice Brennan apparently thought that the Court had dismissed the *Tedesco* case because the appeal presented no colorable claim, since the Louisiana court had been right in testing the New Orleans districting by its standard of rationality.[9]

In *Glass v. Hancock County Election Commission,* subsequent to *Baker v. Carr,* there was involved a disproportion between districts for election of county supervisors. Presented was a question whether this population disparity and the consequent disproportion in voting strength was such an invidious discrimination as violated the requirements of

[9] *Reapportionment,* 79 Harvard L. Rev. 1228, 1272; U.S. Br. 66.

the Fourteenth Amendment. Again this Court dismissed the appeal (denied certiorari) because there was no substantial federal question presented.

There is reason for refusing to impose the so-called one man, one vote rule upon the counties and other municipal governments. There is properly concern as to the nature and powers of the bodies involved. There is wisdom in suggesting a distinction in the application of the equal-population principle depending upon a proper classification of the functions performed by the governmental body and its effect upon persons who are not similarily situated and do not stand in the same relation to the governmental action in question. Undoubtedly this is one of the grounds of the decision of the Texas Supreme Court — that the Texas Commissioners Courts do not take actions which importantly affect the residents of the City of Midland.

With its unchallenged knowledge of the local Texas situation, the Texas court has found that the voice of the rural areas will be lost for all practical purposes if the commissioners precincts are apportioned solely on a population basis, and yet, important affairs of the county — such as roads, bridges, taxable values of large land areas, etc. — disproportionately concern the rural areas (Texas S. Ct. op., R. 149). As found by the Texas Supreme Court, "* * * developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the

major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers" (R. 149).

In this connection the following paragraph is taken from the brief which the United States filed in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (U.S. Br. 29-30):

> " 'Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the remainder was scattered over wide country areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas.' "[10]

While the Court in *Reynolds v. Sims* rejected the consideration of factors other than population in apportionment of state legislators, the reasons for doing so in the State cases are not convincing here. State governments number fifty. Their powers and problems are similar — taxation, education, public roads, hospitals, conservation of natural resources, etc. Local governments including the Texas counties, on the other hand, present the broadest imaginable spectrum. Their governing bodies number in the tens of thousands and differ widely in powers and responsibilities. They include counties such as Midland County, Texas and cities, townships, metropolitan governments, school districts, hospital districts and planning commissions. They include governmental units of both limited and broad

[10] *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 759, 84 S. Ct. 1459, 1486.

judicial, executive and administrative or even legislative powers. And units of the same name may have different functions from state to state. For example, apparently in Virginia a county exercises substantially all governmental powers except for maintenance of roads, while in Texas a county has very limited powers and, as a practical matter, only those administrative and judicial. We do not advocate that the courts discard population as one of the factors to be considered. We simply say that the Equal Protection Clause as applied to local governing bodies should be interpreted to require no more than a rational system responsive to local conditions. The straightjacket which Petitioner (and, in part, the United States) seeks to impose by an automatic and exclusive application of the population-equality rule would be wholly intolerable.

One of the better arguments recognizing the important need for an element of discretion in the manner in which local governments may be required to confrom to the one man, one vote principle appears in the opinion of the Supreme Court of New York in *Town of Greenburgh v. Board of Supervisors*, 157 N.Y. Law J. No. 29, p. 18 (February 3, 1967), where it was said:

> "Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one

county may be unacceptable in another (cf. *Reynolds v. Sims*, supra, 377 U.S. 533, 578, *Swann v. Adams*, supra). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county boards of supervisors which justify a different approach to county reapportionment problems than that which has been approved, so far with respect to state plans * * *.

"The prohibition of the equal protection clauses goes no further than the invidious discrimination (cf. *Williamson v. Lee Optical Co.*, supra, 348 U.S. 483, 489), and a legislative apportionment plan which seeks to preserve a separate voice in legislative processes, to the small, as well as the large communities if it can be effected without such discrimination, neither violates that prohibition, nor is it because of that purpose, irrational or unreasonable * * *"

Population is, of course, an important factor in the division of any school district, city, county or state. However, population must at times and to some degree be subordinated in devising an apportionment plan which is to achieve the important goal of ensuing a fair, effective and balanced representation of the regional, social and economic interests within a county. What constitutes a rational plan reasonably designed to achieve this objective will vary from county to county and from state to state, since so many of the counties and states are unique, in terms of geography, distribution of industry and population, and variety of social and economic interests. So long as the state's constitutional and statutory law and the apportionment of the county or other municipality reasonably achieves effective and bal-

anced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan can not be considered irrational and should not be held to involve invidious discrimination.

There is another serious problem facing the Court if it here takes charge and orders a different redistricting of Midland County, Texas. Reapportionment of Midland County, Texas and other county and municipal governmental units will involve problems of a scale not encountered and hardly imagined before. The years of reapportionment litigation involving state legislatures since *Reynolds v. Sims* has been accompanied by many and varied unusual stresses on the judicial-legislative relations. At least this process appears to now have some foreseeable end. Once the fifty states are apportioned in accordance with the rules set by this Court, the role of the courts should be limited to adjudicating occasional disputes in the States. However, the 1962 census of governments found that 91,186 governmental units exercises state-delegated powers in the United States. Even if reapportionment were to be limited to general-function units, approximately 3,043 counties, 18,000 cities, towns and villages, and 17,142 townships meet the qualifications of general-function units.[11]

Among other problems which would arise in setting standards for local reapportionment solely on a population basis is that the decennial census, which provides roughly adequate figures for congressional and state districting, may be badly out of date for purposes of county and municipal

[11] *Reapportionment*, 79 Harv. L. Rev. 1228, 1274, et seq.

apportionment. Housing developments, urban renewal demolitions, construction of airports and related industrial areas, or even the building of a highway may drastically alter the distribution of population among the smaller voting districts within a very short time. The desire for stability and continuity in government makes this kind of continuous reapportionment impractical. The judicial entry into this realm of thousands and thousands of cases would be profoundly ill-advised.

What the State of Texas has done by its Constitution and its statutory laws—and the judgment of the Texas Supreme Court—is to adopt a plan of county apportionment which is designed in a rational way to insure that minority voices be heard. This plan and assumption of responsibility by the Texas courts should not be here defeated.

IV *Amicus Curiae Brief of the United States*

In its amicus curiae brief, the United States has stated its position to "assert the public interest—and that of millions of American citizens—in fair representation at the local government level" (U.S. Br. 3). Respondents are likewise interested in the public interest, and especially in fair representation of all the county's citizens at the local Commissioners Court level. Respondents are primarily interested in this their particular suit and the place of their court in the judicial machinery of their county, state and country. They are willing to and will abide by the decision of the Supreme Court of Texas. They recognize their burden if

the judgment of the Texas court be affirmed, and if permitted to do so they will undertake fair and constitutional apportionment.

As the Government's brief says, the petition on which Petitioner went to trial in the District Court of Midland County, Texas alleged that factors, other than population, such as land area and assessed valuation of property were irrelevant and "were grossly disproportionate among the four precincts" (R. 9-10). The United States says that it does not discuss these other factors at length "since the overriding constitutional consideration * * * is whether the prescribed districts are substantially equal in population, although equal distribution of such other factors may of course be both desirable and equitable" (U.S. Br. 10). It is, of course, proper to call this Court's attention to the fact that these other factors are relevant and may be both desirable and equitable. In fact, this is the argument of Respondents.

In its brief the *amicus* has stated that, "Although the trial court made no explicit reference to the Equal Protection Clause of the Federal Constitution, it clearly appears that its holding was based on Federal as well as State constitutional ground" (U.S. Br. 13). This is a correct statement of the bases of the holding of the Texas courts.

It is said in the brief, as if to support other argument, that, "the Texas Supreme Court plainly concluded that the federal Constitution's Equal Protection Clause does 'not require a commissioner's precinct division of Texas counties' solely upon a population basis 'in all cases.'" (U.S. Br. 15).

There are here *three* most important words or clauses, to wit: that the Federal Constitution does not *require* the reapportionment *solely* upon a population basis *in all cases.* There are many Texas counties of different population, size and social and economic interests. No fixed and final rule of law should be fostered upon those counties requiring them in all cases, regardless of those differences, to apportion the counties solely upon a population basis with no consideration of local individuality.

The Texas court has not only considered the population factor but it has also considered and authorized the Commissioners Court to consider other relevant factors to achieve effective and balanced representation of all of the substantial interests within the county. This is not at all to say, as has the United States, that "the opinion of the Supreme Court is a clear statement that the equal-population principle does not apply to a Texas county's governing body" (U.S. Br. 22). This is to say only that in deciding apportionment of Texas counties, the equal-population principle does not control all counties in all cases.

The United States says in its brief that, "To be sure, the Court included in its *Sailors* opinion a quotation from *Reynolds* relating to the non-sovereign status of political subdivisions which several courts have referred to in support of a determination that the equal-population principle is inapplicable at the local level * * *. That language is plainly explicable by the context in which it appears * * * and was, in our view, included in the *Sailors* opinion in connection with the accepted proposition that a State 'has vast leeway

in the management of its internal affairs' " (U.S. Br. 29-31). Respondents have no argument with this statement.

In the brief it is said, "In the concluding paragraph of the *Dusch* opinion, the Court stated that the 7-4 plan 'seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside' " (U.S. Br. 34). This Court did make this statement. It is presumed that the statement was made for a purpose, and the purpose was to make clear that *in some cases* the plan or apportionment may quite properly include and reflect a relaxing of the relations or comparisons between equality of votes in the urban and rural communities to reserve the proper balance between the "modern megalopolis" and the rural countryside.

The *amicus* admits with some candor that, "Certain of the language in this Court's opinion in the *Sailors* case * * * might possibly be read as suggesting a distinction as to the applicability of the equal-population principle depending upon a classification of the functions performed by various local governmental bodies" (U.S. Br. 41). Respondents do so read that language in the Court's opinion in the *Sailors* case. Respondents believe that this reading of that language is not only reasonable but is required.

From the government's brief, it appears that there was questioning at the oral argument of the *Moody*, *Bianchi*, *Sailors* and *Dusch* cases, indicating a concern as to the nature and powers of the governmental bodies involved in

those cases (U.S. Br. 41). Undoubtedly this concern was genuine, and for this reason Respondents have attempted to discuss the nature and powers of the Commissioners Courts of Texas, as explained in the opinions of the Supreme Court of Texas. Certainly this Court can better look at those opinions of the Texas court to find and learn the nature and powers of the Texas Commissioners Court than from reading the argumentative briefs of either of the parties to this cause or the amicus curiae brief of the United States.

The most persuasive arguments of the United States appear in the latter part of its brief. Respondents here refer to and quote these *reasonable* statements of policy:

> "Implicit in this traditional view in Equal Protection Clause litigation is the converse notion that, where persons are not similarly situated and do not stand in the same relation to the governmental action in question, different treatment is permissible and classifications are valid so long as they are rationally related to the purposes of the legislation and take properly into account the differences in how the persons are situated" (U.S. Br. 52).

> "Where a governmental body's actions do not touch or involve citizens generally, but only a discrete and identifiable part of the citizenry in a significant way, then a districting plan which rationally takes this consideration into account may comport with the requirements of the Equal Protection Clause, even though this entails substantial deviations from a population basis. Such a plan might allow only certain persons to elect the members of such a body, might weight the votes of those directly affected by that body's actions more heavily than others, or might simply arrange

the districts so that effect would be given to the fact that the body acts in a way which primarily affects only certain citizens" (U.S. Br. 53).

"In other words, since Reynolds assumes that all citizens are similarly situated *vis-a-vis* the body whose members are to be elected, where the contrary can be shown and where a districting plan is rationally and intentionally grounded on such a consideration, deviations from the equal-population principle may be permissible" (U.S. Br. 54).

"It might be suggested that the same sort of approach should be regarded as applicable to at least some general-function units as well. Indeed, in the instant case the Texas Supreme Court pointed out that the county board functions mainly in the rural areas of the county, while many of the governmental functions relating to the city residents are handled by the city council" (U.S. Br. 55).

"In light of these considerations, it has been asserted that 'when governmental functions are divided between two bodies in the same geographical area—county and city—the recognition of such elements as the differing stake of urban and rural citizens may be relevant'" (U.S. Br. 66).

"Note, *Reapportionment*, 79 Harv. L. Rev. 1228, 1227 (1966), which further notes 'the different degrees of political responsibility a county board may have to its urban and rural constituents' *(ibid.)*. See also *Hanlon v. Towey*, 142 N.W. 2d 741, 747 (Minn.), and Note, 11 S. Dak. L. Rev. 386, 395 (1966)" (U.S. Br. 66).

"This result (requiring districting based solely on population) may appear a harsh one in the instant case because the sparsity of population in the rural areas could well result in depriving those who live there of any effective voice if population-based districting is required" (U.S. Br. 69).

> "Of course, nothing prevents those living in rural areas from seeking election to the county board from whatever revised districts are prescribed, and it is doubtful that the city dwellers would complain greatly if the rural areas were given one seat on the body, although this would not be in strict accord with the equal-population principle, since then, at least, the rural areas would not have majority control of the board" (U.S. Br. 69).

We would conclude with the statement made by the United States that, "Indeed, if there were a practical way of assessing and reflecting the somewhat greater interest of the rural inhabitants in the actions of a county governing board, it would not seem improper to do so." (U.S. Br. 67). The Texas Supreme Court had declared that, indeed, there is a practical way of redistricting Midland County, Texas to reflect the interests of all of the inhabitants of the county without dividing the county solely on a population basis. In the words of the United States *amicus*, it would not seem improper to so require apportionment.

CONCLUSION

There has been no showing of discrimination—invidious or otherwise—against Petitioner or any other person by the judgment of the Supreme Court of Texas *unless* this Court is to now assert its jurisdiction and hold *as a matter of law* that *in all cases* there must be apportionment of sub-state governmental units *solely* on a population basis. The Texas Supreme Court has held as a matter of fact that there was discrimination in the lowest court—the Commissioners Court—as found by the Texas District Court. The case has

been reversed and remanded to the lower Texas courts to eliminate this condition. *Unless* this Court is to now abandon its past consideration of the complex problems of county and city government and pronounce the absolute and inviolate rule that all such governmental agencies of the State must be divided on an equal population basis, the judgment of the Texas Supreme Court should be affirmed.

Wherefore, we urge the Court to affirm the decision and judgment of the Supreme Court of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing Brief has been served on Petitioner, by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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Copies of this brief have also been mailed to the United States as Amicus Curiae, by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Ralph S. Spritzer
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Washington, D. C. 20530.

Dated this .... day of October, 1967.

F. H. Pannill

SUPREME COURT OF THE UNITED STATES

No. 39.—October Term, 1967.

Hank Avery, Petitioner,
v.
Midland County, Texas, et al.

On Writ of Certiorari to the Supreme Court of Texas.

[April 1, 1968.]

Mr. Justice White delivered the opinion of the Court.

Petitioner, a taxpayer and voter in Midland County, Texas, sought a determination by this Court that the Texas Supreme Court erred in concluding that selection of the Midland County Commissioners Court from single-member districts of substantially unequal population did not necessarily violate the Fourteenth Amendment. We granted review, 388 U. S. 905 (1967), because application of the one man, one vote principle of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), to units of local government is of broad public importance. We hold that petitioner, as a resident of Midland County, has a right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident.

Midland County has a population of about 70,000. The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote only to break a tie. The other four are chosen from districts. The size of those districts, according to the 1963 population estimates that were relied upon when this case was tried, was respectively 67,906, 852, 414, and 828. This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.

The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with

a variety of functions. According to the commentary to Vernon's Texas Statutes, the court:

> "is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments." [1]

The court is also authorized, among other responsibilities, to build and run a hospital, Tex. Rev. Civ. Stat. Ann. Art. 4492 (1966), an airport, *id.*, Art. 2351 (1964), and libraries, *id.*, Art. 1677 (1962). It fixes boundaries of school districts within the county, *id.*, Art. 2766 (1965), may establish a regional public housing authority, *id.*, Art. 1269k, § 23a (1963), and determines the districts for election of its own members, Tex. Const., Art. V, § 18.

Petitioner sued the Commissioners Court and its members in the Midland County District Court, alleging that the disparity in district size violated the Fourteenth Amendment and that he had standing as a resident, taxpayer, and voter in the district with the largest population. Three of the four commissioners testified at the trial, all telling the court (as indeed the population statistics for the established districts demonstrated) that population was not a major factor in the districting process. The trial court ruled for petitioner. It made

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[1] Interpretive Commentary, Vernon's Ann. Tex. Const., Art. V, § 18 (1955). See also W. Benton, Texas: Its Government and Politics 360–370 (1966); J. Claunch ed., Municipal and County Government (1961); C. McCleskey, The Government and Politics of Texas (1966).

no explicit reference to the Fourteenth Amendment, but said the apportionment plan in effect was not "for the convenience of the people," the apportionment standard established by Art. V, § 18 of the Texas Constitution. The court ordered the defendant commissioners to adopt a new plan in which each precinct would have "substantially the same number of people."

The Texas Court of Civil Appeals reversed the judgment of the District Court and entered judgment for the defendants, 397 S. W. 2d 919 (1965). It held that neither federal nor state law created a requirement that Texas county commissioners courts be districted according to population.

The Texas Supreme Court reversed the Court of Civil Appeals, 406 S. W. 2d 422 (1966). It held that under "the requirements of the Texas and the United States Constitutions" the present districting scheme was impermissible "for the reasons stated by the trial court." 406 S. W. 2d, at 425. However, the Supreme Court disagreed with the trial court's conclusion that precincts must have substantially equal populations, stating that such factors as "number of qualified voters, land areas, geography, miles of county roads and taxable values" could be considered. 406 S. W. 2d, at 428. It also decreed that no Texas courts could redistrict the Commissioners Court. "This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate." 406 S. W. 2d, at 428–429.[2]

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[2] The Texas Supreme Court determined that neither the State nor the Federal Constitution requires that population be the sole basis for apportioning the Midland County Commissioners Court. There is therefore no independent state ground for the refusal to award the relief requested by petitioner. And since the Supreme Court opinion contemplated no further proceedings in the lower Texas courts, a "final judgment" that population does not govern

In *Reynolds* v. *Sims, supra,* the Equal Protection Clause was applied to the apportionment of state legislatures. Every qualified resident, *Reynolds* determined, has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population. The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate size. As has almost every court which has addressed itself to this question,[3] we hold that it does.[4]

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the apportionment of the Commissioners Court is before us. See *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555 (1963); *Construction Laborers* v. *Curry,* 371 U. S. 542 (1963); *Radio Station WOW* v. *Johnson,* 326 U. S. 120 (1945).

[3] Cases in which state highest courts applied the principles of *Reynold* v. *Sims* to units of local government include *Miller* v. *Board of Supervisors,* 63 Cal. 2d 343, 405 P. 2d 857, 46 Cal. Rptr. 617 (1965); *Montgomery County Council* v. *Garrott,* 243 Md. 634, 222 A. 2d 164 (1966); *Hanlon* v. *Towey,* 274 Minn. 187, 142 N. W. 2d 741 (1966); *Armentrout* v. *Schooler,* 409 S. W. 2d 138 (Mo. 1966); *Seaman* v. *Fedourich,* 16 N. Y. 2d 94, 209 N. E. 2d 778, 262 N. Y. S. 2d 444 (1965); *Bailey* v. *Jones,* 81 S. D. 617, 139 N. W. 2d 385 (1966); *State ex rel. Sonneborn* v. *Sylvester,* 26 Wis. 2d 43, 132 N. W. 2d 249 (1965). *Newbold* v. *Osser,* 425 Pa. 478, 230 A. 2d 54 (1967), seemed to assume application of *Reynolds.* In opposition to these cases are only the decision of the Texas Supreme Court in the case before us and *Brouwer* v. *Bronkema,* 377 Mich. 616, 141 N. W. 2d 98 (1966), in which the eight justices of the Michigan Supreme Court divided evenly on the question.

Among the many federal court cases applying *Reynolds* v. *Sims* to local government are *Hyden* v. *Baker,* — F. Supp. — (D. C. M. D. Tenn. 1968); *Martinolich* v. *Dean,* 256 F. Supp. 612 (D. C. S. D. Miss. 1966); *Strickland* v. *Burns,* 256 F. Supp. 824 (D. C. M. D. Tenn. 1966); *Ellis* v. *Mayor of Baltimore,* 234 F. Supp. 945 (D. C. Md. 1964), affirmed and remanded, 352 F. 2d 123 (C. A. 4th Cir. 1965).

[4] A precedent frequently cited in opposition to this conclusion is *Tedesco* v. *Board of Supervisors,* 43 So. 2d 514 (La. Ct. App.

The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through municipal subdivisions of the State.

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action . . . ." *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958).

Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment.[5] The actions of local government *are* the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of the law.

When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have

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1949), appeal dismissed for want of a substantial federal question, 339 U. S. 940 (1950). Petitioner points out that the Equal Protection Clause was not invoked in *Tedesco*, where the districting of the New Orleans City Council was challenged under the Privileges and Immunities Clause. A more realistic answer is that *Tedesco*, decided 12 years before *Baker* v. *Carr*, 369 U. S. 186 (1962), has been severely undermined by *Baker* and the succeeding apportionment cases. See, among the great many cases so concluding, *Delozier* v. *Tyrone Area School Bd.*, 247 F. Supp. 30 (D. C. W. D. Pa. 1965).

[5] *Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958); see, *e. g.*, *See* v. *City of Seattle*, 387 U. S. 541 (1967); *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. If the five senators representing a city in the state legislature may not be elected from districts ranging in size from 50,000 to 500,000, neither is it permissible to elect the members of the city council from those same districts. In either case, the votes of some residents have greater weight than those of others; in both cases the equal protection of the laws has been denied.

That the state legislature may itself be properly apportioned does not exempt municipalities from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the

application of the Equal Protection Clause and of the principles of *Reynolds* v. *Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.[6]

We are urged to permit unequal districts for the Midland County Commissioners Court on the ground that the court's functions are not sufficiently "legislative." The parties have devoted much effort to urging that alternative labels—"administrative" versus "legislative"—be applied to the Commissioners Court. As the brief description of the court's functions above amply demonstrates, this unit of local government cannot easily be classified in the neat categories favored by civics texts. The Texas commissioners courts are assigned some tasks which would normally be thought of as "legislative," others typically assigned to "executive" or "administrative" departments, and still others which are "judicial." In this regard Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties, towns, and villages.[7] One

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[6] Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that to be paid by equally situated members of the majority. Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713 (1964), stands as a square adjudication by this Court of these principles.

[7] Midland County is apparently untypical in choosing the members of its local governing body from districts. "On the basis of

knowledgeable commentator has written of "the states' varied, pragmatic approach in establishing governments." R. Wood, in E. Redford *et al.*, Politics and Government in the United States 891–892 (1965). That approach has produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 "units of government" in the United States[8]—and an even more staggering diversity. Nonetheless, while special purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. In many cases citizens reside within and are subject to two such governments, a city and a county.

The Midland County Commissioners Court is such a unit. While the Texas Supreme Court found that the Commissioners Court's legislative functions are "negligible," 406 S. W. 2d, at 426, the court does have power to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion

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reliable figures, coupled with rough estimates from samplings made of the situations in various States, it appears that only about 25 percent of . . . local government governing boards are elected, in whole or in part, from districts or, while at large, under schemes including district residence requirements." Brief for the United States as Amicus Curiae, p. 22, n. 31, filed in *Sailors* v. *Board of Educ.*, 387 U. S. 105 (1967), and the other 1966 Term local reapportionment cases.

[8] U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, Governmental Units in 1967, at 1 (prelim. rept. Oct. 1967).

in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built, and land set aside for schools—and immediate choices among competing needs.

The Texas Supreme Court concluded that the work actually done by the Commissioners Court "disproportionately concern[s] the rural areas," 406 S. W. 2d, at 428. Were the Commissioners Court a special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such bodies may be apportioned in ways which give greater influence to the citizens most affected by the organizations' functions. That question, however, is not presented by this case, for while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland. The Commissioners maintain buildings, administer welfare services, and determine school districts both inside and outside the city. The taxes imposed by the court fall equally on all property in the county. Indeed, it may not be mere coincidence that a body apportioned with three of its four voting members chosen by residents of the rural area surrounding the city devotes most of its attention to the problems of that area, while paying for its expenditures with a tax imposed equally on city residents and those who live outside the city. And we might point out that a decision not to exercise a function within the court's power—a decision, for example, not to build an airport or a library, or not

to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision.

The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. The conclusion of *Reynolds* v. *Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors* v. *Board of Educ.*, 387 U. S. 105 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch* v. *Davis*, 387 U. S. 112 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population.

The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called "the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations . . . ." R. Wood, 1400 Governments, at 175 (1961). Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

The judgment below is vacated and the case is remanded for disposition not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 39.—OCTOBER TERM, 1967.

Hank Avery, Petitioner,
v.
Midland County, Texas, et al.
} On Writ of Certiorari to the Supreme Court of Texas.

[April 1, 1968.]

MR. JUSTICE HARLAN, dissenting.

I could not disagree more with this decision, which wholly disregards statutory limitations upon the appellate jurisdiction of this Court in state cases and again betrays such insensitivity to the appropriate dividing lines between the judicial and political functions under our constitutional system.

I.

I believe that this Court lacks jurisdiction over this case because, properly analyzed, the Texas judgment must be seen either to rest on an adequate state ground or to be wanting in "finality." The history of the Texas proceedings, as related in the Court's opinion, *ante*, p. —, clearly reveals that the decision of the Texas Supreme Court disallowing the present county apportionment scheme rests upon a state as well as a federal ground. The state ground—Art. V, § 18, of the Texas Constitution—was clearly adequate to support the result. This should suffice to defeat the exercise of this Court's jurisdiction. See, *e. g., Department of Mental Hygiene* v. *Kirchner*, 380 U. S. 194; *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126.

Nor does this Court have jurisdiction to review the Texas Supreme Court's statement that in reapportioning the county in the future the county commissioners may take into account factors other than population. That

holding obviously does not amount to a "[f]inal judgment" within the meaning of 28 U. S. C. § 1257.[1] The traditional test of finality of state court judgments has been whether the judgment leaves more than a ministerial act to be done. See, *e. g., Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68. It is clear that the acts which must be performed in order to bring about a new apportionment of Midland County are very far from ministerial in character, and conceivably might even result in satisfying petitioner's demands without further litigation. For example, since the statement of the Texas Supreme Court regarding nonpopulation factors was merely advisory and not mandatory, the county commissioners might choose to reapportion the county solely on the basis of population, thus leaving petitioner with nothing about which to complain. Since the requirement of finality is an unwaivable condition of this Court's jurisdiction, see, *e. g., Market St. R. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551, I consider that this case is not properly before us.

On these scores, I would dismiss the writ as improvidently granted.

II.

On the merits, which I reach only because the Court has done so, I consider this decision, which extends the state apportionment rule of *Reynolds* v. *Sims*, 377 U. S. 533, to an estimated 80,000 units of local government throughout the land, both unjustifiable and ill-advised.

I continue to think that these adventures of the Court in the realm of political science are beyond its constitutional powers, for reasons set forth at length in my dissenting opinion in *Reynolds*, 377 U. S., at 589 *et seq.*

[1] 28 U. S. C. § 1257 provides: "Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court as follows . . . ."

However, now that the Court has decided otherwise, judicial self-discipline requires me to follow the political dogma now constitutionally embedded in consequence of that decision. I am not foreclosed, however, from remonstrating against the extension of that decision to new areas of government. At the present juncture I content myself with stating two propositions which, in my view, stand strongly against what is done today. The first is that the "practical necessities" which have been thought by some to justify the profound break with history that was made in 1962 by this Court's decision in *Baker* v. *Carr*, 369 U. S. 186,[2] are not present here. The second is that notwithstanding *Reynolds* the "one man, one vote" ideology does not provide an acceptable formula for structuring local governmental units.

A.

The argument most generally heard for justifying the entry of the federal courts into the field of state legislative apportionment is that since state legislatures had widely failed to correct serious malapportionments in their own structure, and since no other means of redress had proved available through the political process, this Court was entitled to step into the picture.[3] While I continue to reject that thesis as furnishing an excuse for the federal judiciary straying outside its proper constitutional role, and while I continue to believe that it bodes ill for the country and the entire federal judicial system if this Court does not firmly set its face against this loose

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[2] The magnitude of this break was irrefutably demonstrated by Mr. Justice Frankfurter in his dissenting opinion in *Baker*, 369 U. S., at 266, 300–323.

[3] See the concurring opinion of Mr. Justice Clark in *Baker* v. *Carr*, 369 U. S. 186, 25., 258–259; Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 Sup. Ct. Rev. 1, 68–70 (1964).

and short-sighted point of view, the important thing for present purposes is that no such justification can be brought to bear in this instance.

No claim is made in this case that avenues of political redress are not open to correct any malapportionment in elective local governmental units, and it is difficult to envisage how such a situation could arise. Local governments are creatures of the States, and they may be reformed either by the state legislatures, which are now required to be apportioned according to *Reynolds*, or by amendment of state constitutions.[4] In these circumstances, the argument of practical necessity has no force. The Court, then, should withhold its hand until such a supposed necessity does arise, before intruding itself into the business of restructuring local governments across the country.

There is another reason why the Court should at least wait for a suitable period before applying the *Reynolds* dogma to local governments. The administrative feasibility of judicial application of the "one man, one vote" rule to the apportionment even of state legislatures has not yet been demonstrated. A number of significant administrative questions remain unanswered,[5] and the burden on the federal courts has been substantial. When

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[4] See, *e. g.*, United States Advisory Commission on Intergovernmental Relations, State Constitutional Restrictions Upon the Structural, Functional, and Personnel Powers of Local Government 23–61 (1961); Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 62 Col. L. Rev. 21, 23, n. 9 (1962).

[5] One such question is the extent to which an apportionment may take into account population changes which occur between decennial censuses. Cf. *Lucas* v. *Rhodes*, 389 U. S. 212 (dissenting opinion of this writer). Another is the degree of population variation which is constitutionally permissible. See *Swann* v. *Adams*, 385 U. S. 440; cf. *Rockefeller* v. *Wells*, 389 U. S. 421 (dissenting opinion of this writer).

this has thus far been the outcome of applying the rule to 50 state legislatures, it seems most unwise at this time to extend it to some 80,000 units of local government, whose bewildering variety is sure to multiply the problems which have already arisen and to cast further burdens, of imponderable dimension, on the federal courts. I am frankly astonished at the ease with which the Court has proceeded to fasten upon the entire country at its lowest political levels the strong arm of the federal judiciary, let alone a particular political ideology which has been the subject of wide debate and differences from the beginnings of our Nation.[6]

B.

There are also convincing functional reasons why the *Reynolds* rule should not apply to local governmental units at all. The effect of *Reynolds* was to read a long debated political theory—that the only permissible basis for the selection of state legislators is election by majority vote within areas which are themselves equal in population—into the United States Constitution, thereby foreclosing the States from experimenting with legislatures rationally formed in other ways. Even assuming that this result could be justified on the state level, because of the substantial identity in form and function of the state legislatures, and because of the asserted practical necessities for federal judicial interference referred to above, the "one man, one vote" theory is surely a hazardous generalization on the local level. As has been noted previously, no "practical necessity" has been asserted to justify application of the rule to local governments. More important, the greater and more varied range of functions performed by local governmental units implies that flexibility in the form of their structure is

[6] See the dissenting opinion of Mr. Justice Frankfurter in *Baker* v. *Carr*, 369 U. S. 186, 266, 300–324.

even more important than at the state level, and that by depriving local governments of this needed adaptability the Court's holding may indeed defeat the very goals of *Reynolds*.

The present case affords one example of why the "one man, one vote" rule is especially inappropriate for local governmental units. The Texas Supreme Court held as a matter of Texas law:

> "Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope and function of the commissioners court and limited its major responsibilities to the non-urban areas of the county. It has come to pass that the city government . . . is the major concern of the city dwellers and the administration of the county is the major concern of rural dwellers." 406 S. W. 2d 422, 428.

Despite the specialized role of the commissioners court, the majority has undertaken to bring it within the ambit of *Reynolds* simply by classifying it as "a unit of local government with general responsibility and power for local affairs." See p. —, *ante*. Although this approach is intended to afford "equal protection" to all voters in Midland County, it would seem that it in fact discriminates against the county's rural inhabitants. The commissioners court, as found by the Texas Supreme Court, performs more functions in the area of the county outside Midland City than it does within the city limits. Therefore, each rural resident has a greater interest in its activities than each city dweller. Yet under the majority's formula the urban residents are to have a dominant voice in the county government, precisely proportional to their numbers, and little or no allowance may be made

for the greater stake of the rural inhabitants in the county government.

This problem is not a trivial one and is not confined to Midland County. It stems from the fact that local governments, unlike state governments, are often specialized in function.[7] Application of the *Reynolds* rule to such local governments prevents the adoption of apportionments which take into account the effect of this specialization, and therefore may result in a denial of equal treatment to those upon whom the exercise of the special powers has unequal impact. Under today's decision, the only apparent alternative is to classify the governmental unit as other than "general" in power and responsibility, thereby, presumably, avoiding application of the *Reynolds* rule. Neither outcome satisfies *Reynolds'* avowed purpose: to assure "equality" to all voters. The result also deprives localities of the desirable option of establishing slightly specialized, elective units of government, such as Texas' county commissioners court, and varying the size of the constituencies so as rationally to favor those whom the government affects most. The majority has chosen explicitly to deny local governments this alternative by rejecting even the solution of the Texas Supreme Court, which held that the present county apportionment was impermissible but would have allowed the new apportionment to reflect factors related to the special functions of the county commissioners court, such as "land areas, geography, miles of county roads, and taxable values," 406 S. W. 2d, at 428, as well as population.

Despite the majority's declaration that it is not imposing a "straitjacket" on local governmental units, see p.

[7] See generally Anderson & Weidner, State and Local Government 85–103 (1951)

—, *ante*, its solution is likely to have other undesirable "freezing" effects on local government. One readily foreseeable example is in the crucial field of metropolitan government. A common pattern of development in the Nation's urban areas has been for the less affluent citizens to migrate to or remain within the central city, while the more wealthy move to the suburbs and come into the city only to work.[8] The result has been to impose a relatively heavier tax burden upon city taxpayers and to fragmentize governmental services in the metropolitan area.[9] An oft-proposed solution to these problems has been the institution of an integrated government encompassing the entire metropolitan area.[10] In many instances, the suburbs may be included in such a metropolitan unit only by majority vote of the voters in each suburb.[11] As a practical matter, the suburbanites often will be reluctant to join the metropolitan government unless they receive a share in the government proportional to the benefits they bring with them and not

[8] See, *e. g.*, Anderson & Weidner, *supra*, at 171–174; United States Advisory Commission on Intergovernmental Relations for use of House Committee on Government Operations, 87th Cong., 1st Sess., Governmental Structure, Organization, and Planning in Metropolitan Areas 7 (Comm. Print 1961).

[9] See, *e. g.*, United States Advisory Commission on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas 8–9 (1962); United States Advisory Commission on Intergovernmental Relations for use of House Committee on Government Operations, 87th Cong., 1st Sess., Governmental Structure, Organization and Planning in Metropolitan Areas 15–16 (Comm. Print 1961).

[10] See, *e. g.*, Anderson & Weidner, *supra*, at 174–179; United States Advisory Commission on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas (1962).

[11] See, *e. g.*, United States Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions upon the Structural, Functional, and Personnel Powers of Local Government 38, 44–53 (1962).

merely to their numbers.[12] The city dwellers may be ready to concede this much, in return for the ability to tax the suburbs. Under the majority's pronouncements, however, this rational compromise would be forbidden: the metropolitan government must be apportioned solely on the basis of population if it is a "general" government.

These functional considerations reinforce my belief that the "one man, one vote" rule, which possesses the simplistic defects inherent in any judicially imposed solution of a complex social problem,[13] is entirely inappropriate for determining the form of the country's local governments.

No better demonstration of this proposition could have been made than that afforded by the admirable analysis contained in the dissenting opinion of my Brother FORTAS. But, with respect, my Brother's projected solution of the matter is no less unsatisfactory. For it would bid fair to plunge this Court into an avalanche of local reapportionment cases with no firmer constitutional anchors than its own notions of what constitutes "equal protection" in any given instance.

With deference, I think that the only sure-footed way of avoiding, on the one hand, the inequities inherent in today's decision, and on the other, the morass of pitfalls that would follow from my Brother FORTAS' approach, is for this Court to decline to extend the constitutional experiment of *Reynolds*, and to leave the structuring of local governmental units to the political process where it belongs.

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[12] See Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col. L. Rev. 21, 37 and n. 67 (1965); cf. United States Advisory Commission on Intergovernmental Relations, Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas 26–27 (1962).

[13] Cf. Hart & Sacks, The Legal Process 662–669 (tent. ed. 1958).

SUPREME COURT OF THE UNITED STATES

No. 39.—October Term, 1967.

Hank Avery, Petitioner,
v.
Midland County, Texas, et al.

On Writ of Certiorari to the Supreme Court of Texas.

[April 1, 1968.]

Mr. Justice Fortas, dissenting.

I would dismiss the writ in this case as improvidently granted. The Texas Supreme Court held the districting scheme unlawful under the Texas Constitution. It ordered redistricting. In this difficult and delicate area I would await the result of the redistricting so that we may pass upon the final product of Texas' exercise of its governmental powers, in terms of our constitutional responsibility, and not upon a scheme which Texas herself has invalidated.[1]

The Court's opinion argues (note 2) that the Texas Supreme Court's order is a final judgment because it contemplates no further proceedings in the Texas courts, although it holds the present districting unlawful and requires the Commissioners Court to redistrict. I do not reach this point.

The Court acts now to superimpose its own formula because it disagrees with the standard for redistricting that the Texas Supreme Court states. That standard directed redistricting on the basis of the "number of qualified voters, land areas, geography, miles of county

[1] The Texas Supreme Court noted that the Commissioners Court, and not Texas' judicial courts, has power to redistrict. This view may prove to be troublesome, but we are not bound to anticipate either that the Commissioners Court will not properly do the job or that Texas will not otherwise put its house in order in Midland County.

roads and taxable values." 406 S. W. 2d 422, 428. This standard may or may not produce a result which this Court or I would find constitutionally acceptable. We cannot know in advance how the melange of factors stated by the Texas court would emerge from the mixing machine of the Texas authorities who would deal with the problem. It is clear that the extreme imbalance now prevailing would be eliminated, because the Texas Supreme Court has held it unconstitutional. It might be that the substitute finally worked out would be such that a majority of this Court would not reject it as a denial of equal protection of the law. After all, at the last Term of this Court, we accepted as passing the scrutiny of the Constitution, the less-than-mathematically perfect plans in *Dusch* v. *Davis*, 387 U. S. 112 (1967), and *Sailors* v. *Board of Education*, 387 U. S. 105 (1967).

The Court, however, now plunges to adjudication of the case of Midland County, Texas, in midstream, apparently because it rejects *any* result that might emerge which deviates from the literal thrust of one man-one vote. Since it now adopts this simplistic approach, apparently the majority believe that they might as well say so and save Texas the labor of devising an answer.

I am in fundamental disagreement. I believe, as I shall discuss, that in the circumstances of this case equal protection of the laws may be achieved—and perhaps can only be achieved—by a system which takes into account a complex of values and factors, and not merely the arithmetic simplicity of one equals one. *Dusch* and *Sailors* were wisely and prudently decided. They reflect a reasoned, conservative, empirical approach to the intricate problem of applying constitutional principle to the complexities of local government. I know of no reason why we now abandon this reasonable and moderate approach to the problem of local suffrage and adopt an

absolute and inflexible formula which is potentially destructive of important political and social values. There is no reason why we should insist that there is and can be only one rule for voters in local governmental units—that districts for units of local government must be drawn solely on the basis of population. I believe there are powerful reasons why, while insisting upon reasonable regard for the population-suffrage ratio, we should reject a rigid, theoretical, and authoritarian approach to the problems of local government. In this complex and involved area, we should be careful and conservative in our application of constitutional imperatives, for they are powerful.

Constitutional commandments are not surgical instruments. They have a tendency to hack deeply—to amputate. And while I have no doubt that, with the growth of suburbia and exurbia, the problem of allocating local government functions and benefits urgently requires attention, I am persuaded that it does not call for the hatchet of one man-one vote. It is our duty to insist upon due regard for the value of the individual vote but not to ignore realities or to by-pass the alternatives that legislative alteration might provide.

I.

I agree that application of the Equal Protection Clause of the Constitution, decreed by this Court in the case of state legislatures, cannot stop at that point. Of course local governmental units are subject to the commands of the Equal Protection Clause. *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958). That much is easy. The difficult question, and the one which the Court slights is, what does the Equal Protection Clause demand with regard to local governmental units?

Reynolds v. *Sims*, 377 U. S. 533 (1964), stands for the general proposition that the debasement of the right to

vote through malapportionment is offensive to the Equal Protection Clause. It holds that where the allegedly debased vote relates to the State Legislature, a judicial remedy is available to adjudicate a claim of such debasement, and that, subject to some permissible deviation, the remedy is to require reapportionment on a population basis. Although the Court's opinion carefully emphasizes the appropriateness of allowing latitude to meet local and special conditions, 377 U. S., at 577–581, its insistence upon the need for general correspondence of voting rights to population has come to be called the one man-one vote rule.[2]

This rule is appropriate to the selection of members of a State Legislature. The people of a State are similarly affected by the action of the State Legislature. Its functions are comprehensive and pervasive. They are not specially concentrated upon the needs of particular parts of the State or any separate group of citizens. As the Court in *Reynolds* said, each citizen stands in "the same relation" to the State Legislature. Accordingly, variations from substantial population equality in elections for the State Legislature take away from the individual voter the equality which the Constitution mandates. They amount to a debasement of the citizen's vote and of his citizenship.[3]

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[2] *Reynolds* v. *Sims* did not put the Equal Protection Clause to a radical or new use. Its holding is in the main stream of our equal protection cases. Our cases hold that people who stand in the same relationship to their government cannot be treated differently by that government. To do so would be to mark them as inferior, "implying inferiority in civil society" (*Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880)), or "inferiority as to their status in the community" (*Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954)). It would be to treat them as if they were, somehow, less than people.

[3] "Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are

But the same cannot be said of all local governmental units, and certainly not of the unit involved in this case. Midland County's Commissioners Court has special functions—directed primarily to its rural area and rural population. Its powers are limited and specialized, in light of its missions. Residents of Midland County do not by any means have the same rights and interests at stake in the election of the Commissioners. Equal protection of their rights may certainly take into account the reality of the rights and interests of the various segments of the voting population. It does not require that they all be treated alike, regardless of the stark difference in the impact of the Commissioners Court upon them. "Equal protection" relates to the substance of citizens' rights and interests. It demands protection adapted to substance; it does not insist upon, or even permit, prescription by arbitrary formula which wrongly assumes that the interests of all citizens in the elected body are the same.

In my judgment, the Court departs from *Reynolds* when it holds, broadly and generally, that "the Fourteenth Amendment . . . forbids the election of local government officials from districts of disparate size." P. —, *ante*. This holding, literally applied as the Court commands, completely ignores the complexities of local government in the United States—complexities which, *Reynolds* itself states, demand latitude of prescription. The simplicity of the Court's ruling today does

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collectively responsible to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live . . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen." 377 U. S., at 565, 567.

not comport with the lack of simplicity which characterizes the miscellany which constitutes our local governments.

II.

As of the beginning of 1967, there were 81,253 units of local government in the United States. This figure includes 3,049 county governments, 18,051 municipal governments, 17,107 township governments, 21,782 school districts, and 21,264 other special districts.[4] These units vary greatly in powers, structure, and function. The citizen is usually subject to several local governments with overlapping jurisdiction.

The Court in this case concedes that in "special purpose units of government," the rights of certain constituents may be more affected than the rights of others. It implies that the one man-one vote rule may not apply in such cases. See p. —, *ante*. But it says that we do not here have to confront the implications of such a situation. I do not agree.

I submit that the problem presented by many, perhaps most, county governments (and by Midland County in particular) is precisely the same as those arising from special purpose units. The functions of many county governing boards, no less than the governing bodies of special purpose units, have only slight impact on some of their constituents and a vast and direct impact on others. They affect different citizens residing within their geographical jurisdictions in drastically different ways.[5]

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[4] U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, at 1 (prelim. rept. Oct. 1967).

[5] If these complexities do not exist in a given case (that is, if the functions of the governing unit involved has an essentially equal impact upon all the citizens within its geographical jurisdiction), then the one man-one vote rule would apply as it did in *Reynolds*. Some city councils, for example, are in effect, miniature

Study of county government leaves one with two clear impressions: that the variations from unit to unit are great; and that the role and structure of county government are currently in a state of flux.[6] County governments differ in every significant way: number of constituents, area governed,[7] number of competing or overlapping government units within the county,[8] form, and means of selection of the governing board,[9] services provided,[10] the number and functions of independent county officials,[11] and source of revenue.[12]

Some generalizations can be made about county governments. First, most counties today perform certain basic functions delegated by the State: assessment of property, collection of property taxes, recording of deeds and other documents, maintenance of rural roads, poor relief, law enforcement, and the administration of electoral and judicial functions. Some counties have begun to do more, especially by the assumption of municipal

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state legislatures. Some county governing units have geographical jurisdiction which is co-extensive with a city or which includes only reasonably homogeneous rural areas.

[6] See Adrian, State and Local Governments 210–217 (1960); Snider, Local Government in Rural America 119–139 (1957) (hereafter cited as Snider). International Union of Local Authorities, Local Government in the United States of America 13–14 (1961) (hereafter cited as Local Government); National Municipal League, Model County Charter, xi–xxxviii (1956). See generally Duncombe, County Government in America (1966) (hereafter cited as Duncombe).

[7] See Duncombe 3–5.

[8] See U. S. Dept. of Commerce, Bureau of the Census, Census of Governments: 1962, Governmental Organization, Table 17.

[9] See U. S. Dept. of Commerce, Bureau of the Census, Governing Boards of County Governments: 1965.

[10] See Duncombe 70–102.

[11] See Duncombe 41–63.

[12] See U. S. Dept. of Comerce, Bureau of the Census, Census of Governments: 1962, Finances of County Government, Table 11.

and policy-making functions.[13] But most counties still act largely as administrative instrumentalities of the State.[14]

Second, "the absence of a single chief executive and diffusion of responsibility among numerous independently elected officials are general characteristics of county government in the United States."[15] Those who have written on the subject have invariably pointed to the extensive powers exercised within the geographical region of the county by officials elected on a countywide basis and by special districts organized to perform specific tasks. Often these independent officials and organs perform crucial functions of great importance to all the people within the county.[16]

These generalizations apply with particular force in this case. The population of Midland County is chiefly in a single urban area.[17] That urban area has its own municipal government which, because of home rule,[18] has relative autonomy and authority to deal with urban problems. In contrast, the Midland County government, like county governments generally, acts primarily as an administrative arm of the State. It provides a convenient agency for the State to collect taxes, hold elections, administer judicial and peace-keeping functions, improve roads, and perform other functions which are the ordinary duties of the State. The powers of the

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[13] See Duncombe 13–14.

[14] See Anderson & Weidner, State and Local Government 30–31 (1951); Snider 131–134.

[15] Local Government, at 14.

[16] See, *e. g., ibid.;* Duncombe 41–63; Snider 44–45, 252–254.

[17] In 1962 the population of Midland County was 67,717. More than 62,000 lived in the urban area governed by the municipal government. U. S. Dept. of Commerce, Bureau of the Census, Census of Governments: 1962, Governmental Organizations 186.

[18] Tex. Const., Art. XI, § 5; Young, The Place System in Texas Elections (Institute of Public Affairs, University of Texas, 1965) 38.

Commissioners Court, which is the governing body of Midland County, are strictly limited by statute and constitutional provision.[19] Although a mere listing of these authorizing statutes and constitutional provisions would seem to indicate that the Commissioners Court has significant and general power, this impression is somewhat illusory because very often the provisions which grant the power also circumscribe its exercise with detailed limitations.

For example, the petitioner cities Art. VIII, § 9, of the Texas Constitution and Article 2352 of the Texas Civil Statutes as granting the Commisioners Court authority to levy taxes. Yet, at the time this suit was tried, Art. VIII, § 9, provided that no county could levy a tax in excess of 80¢ on $100 property valuation. And Article 2352 allocated that 80¢ among the four "constitutional purposes" mentioned in Art. VIII, § 9 (not more than 25¢ for general county purposes, not more than 15¢ for the jury fund, not more than 15¢ for roads and bridges, and not more than 25¢ for permanent improvement).[20]

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[19] See Benton, Texas, Its Government and Politics 360–362 (1966) (hereafter cited as Benton); MacCorkle and Smith, Texas Government 339–340 (1964) (hereafter cited as MacCorkle); Patterson, McAlister, and Hester, State and Local Government in Texas 384–385, 388 (1961) (hereafter cited as Patterson); Claunch (ed.), Municipal and County Government 113–114 (1961); Gantt, Dawson, and Haggard (eds.), Governing Texas, Documents and Reading 254 (1966); McClesky, The Government and Politics of Texas 303–304, 305 (1966) (hereafter cited as McClesky). There is a home-rule provision in the Texas Constitution which applies to counties, Art. IX, § 3. But that provision is virtually unworkable and, as of 1966, there were no counties operating under home rule. Benton 372–375. See also McClesky 304, and MacCorkle 341.

[20] The 1967 amendment to Art. VIII, § 9, maintains the 80¢ limitation and still speaks of "the four constitutional purposes." It provides, though, that the county "may" put all tax money into one general fund without regard to the purpose or the source of each

Another example is the authority to issue bonds. It is true, as the majority notes, that the Commissioners Court does have this authority. Yet Title 22 of the Texas Civil Statutes sets up a detailed code concerning how and for what purposes bonds may be issued. Significantly, Article 701 provides that county bonds "shall never be issued for any purposes" unless the bond issue has been submitted to the qualified property tax-paying voters of the county.

More important than the statutory and constitutional limitations, the limited power and function of the Commissioners Court is reflected in what it actually does. The record and briefs do not give a complete picture of the workings of the Commissioners Court. But it is apparent that the Commissioners are primarily concerned with rural affairs, and more particularly with rural roads. One Commissioner testified below that the largest item in the county budget was for roads and bridges.[21] And according to that Commissioner, the county does not maintain streets within the City of Midland. The Commissioners seem quite content to let the city council handle city affairs. "The thing about it is, the city of Midland has the city council and the mayor to run its business, . . . and we have a whole county to run . . . ."

As the Texas Supreme Court stated:

> "Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of

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tax. For a discussion of the county's taxing power and other sources of county revenue, see Benton 367–368.

[21] This testimony appears in the typed transcript of record but not in the portions printed by the parties.

> the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers." 406 S. W. 2d, at 428.

Moreover, even with regard to those areas specifically delegated to the county government by statute or constitutional provision, the Commissioners Court sometimes does not have the power to make decisions. Within the county government there are numerous departments which are controlled by officials elected independently of the Commissioners Court and over whom the Commissioners Court does not exercise control. The Commissioners view themselves primarily as road commissioners. "The other department heads really have the say in that department. We merely approve the salary. We do not hire anyone in any department in Midland County except the road department. The department heads of the other departments do hire the employees."[22]

As the Texas Supreme Court stated, "the county commissioners court is not charged with the management and control of all the county's business affairs. . . . [T]he various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp." 406 S. W. 2d, at 428. These officials, elected on a direct, one man-one vote, countywide basis, include the Assessor and Collector of Taxes, the County Attorney, the Sheriff, the Treasurer, the County Clerk,

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[22] See n. 21, *supra*: Commentators on Texas local government have noted this lack of control by the Commissioners Court. See, *e. g.*, MacCorkle 344–345; McClesky 307, 310; Benton 369.

and the County Surveyor.[23] The County Judge, who is the presiding officer of the Commissioners Court, is also elected on a countywide basis.[24] Other county officials and employees are appointed by the Commissioners Court.[25]

The elected officials are generally residents of the city, probably because of its preponderant vote. A Commissioner testified that "Every elected official . . . in Midland County today [except the three rural commissioners], and it has been way back for years, has been elected by the people that live here in the city limits of Midland." Another Commissioner testified that of about 150 employees of the county, only four of those who were not elected lived in the rural precincts. Of all the elected officials only the three rural commissioners lived outside the city limits.[26] And, as I have noted, the fifth member of the Commissioners Court, its Chairman, is the County Judge who is elected at large in the county.[27] It is apparent that the city people have much

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[23] Article VIII, § 14; Art. V, § 21; Art. V, § 23; Art. XVI, § 44; Art. V, § 20; and Art. XVI, § 44, of the Texas Constitution respectively.

[24] Article V, §§ 15, 18, of the Texas Constitution.

[25] For a description of county officials generally and of their functions, see McClesky 306–310, MacCorkle 335–339; and Patterson 390–392. For a listing of county officials who are elected see U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, Elective Offices of State and Local Governments 117–118 (prelim. rept. Aug. 1967).

[26] See n. 21, *supra*.

[27] Note 24, *supra*. There was testimony below to the effect that the county judge votes only in case of a tie vote. But it appears that this limitation may be self-imposed. "The county judge enjoys equal voting rights with all the other members of the commissioners court, which includes the right to make or second any motion and the right to vote whether there be a tie among the votes of the

more control over the county government than the election of the Commissioners Court would indicate. Many of the county functions which most concern the city, for example, tax assessment and collection, are under the jurisdiction of officials elected by the county at large.[28]

In sum, the Commissioners Court's functions and powers are quite limited, and they are defined and restricted so that their primary and preponderant impact is on the rural areas and residents. The extent of its impact on the city is quite limited. To the extent that there is direct impact in the city, the relevant powers, in important respects, are placed in the hands of officials elected on a one man-one vote basis. Indeed, viewed in terms of the realities of rights and powers, it appears that the city residents have the power to elect the officials who are most important to them, and the rural residents have the electoral power with respect to the Commissioners Court which exercises powers in which they are primarily interested.

In face of this, to hold that "no substantial variation" from equal population may be allowed under the Equal Protection Clause is to ignore the substance of the rights and powers involved. It denies—it does not imple-

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other members of the court or not." 1 Opinions of the Attorney General of Texas 453 (No. 0–1716, 1939). See McClesky 307, n. 27.

[28] The Assessor and Collector of Taxes is elected by the qualified voters of the county at large. Tex. Const., Art. VIII, § 14; U. S. Dept. of Commerce, Bureau of the Census, Census of Governments, 1967, Elective Offices of State and Local Governments 117 (prelim. rept. Aug. 1967). The Commissioners Court has power to adjust the Assessor and Collector's valuation. Art. VIII, § 18, of the Texas Constitution. However, testimony below indicated that the Commissioners Court sits to hear taxpayer complaints only a few days each year. The Commissioners Court does not go over the Assessor and Collector's tax rendition sheets before he sends notices to the taxpayers.

ment—substantive equality of voting rights. It is like insisting that each stockholder of a corporation have only one vote even though the stake of some may be $1 and the stake of others $1,000. The Constitution does not force such a result. Equal protection of the law is not served by it.

Despite the fact, as I have shown, that many governmental powers in the county are exercised by officials elected at large and that the powers of the Commissioners Court are limited, the Court insists that the Commissioners Court is a unit with "general governmental powers." This simply is not so except in the most superficial sense. The Court is impressed by the fact that the jurisdiction of the Commissioners Court extends over the entire area of the county. But this is more form than reality.

Substance not shibboleth should govern in this admittedly complex and subtle area; and the substance is that the geographical extent of the Commissioners Court is of very limited meaning. Midland County's Commissioners Court has its primary focus in nonurban areas and upon the nonurban people. True, the county's revenues come largely from the City of Midland. But the Commissioners Court fixes the tax rate subject to the specific limitations provided by the legislature. It must spend tax revenues in the categories and percentages which the legislature fixes. Taxes are assessed and collected not by it, but by an official elected on a county-wide basis. It is quite likely that if the city dwellers were given control of the Commissioners Court, they would reduce the load because it is spent primarily in the rural area. This is a state matter. If the State Legislature, in which presumably the city dwellers are fairly represented (*Reynolds* v. *Sims*), wishes to reduce the load, it may do so. But unless we are ready to adopt

the position that the Federal Constitution forbids a State from taxing city dwellers to aid their rural neighbors, the fact that city dwellers pay most taxes should not determine the composition of the county governing body. We should not use tax impact as the sole or controlling basis for vote distribution. It is merely one in a number of factors, including the functional impact of the county government, which should be taken into account in determining whether a particular voting arrangement results in reasonable recognition of the rights and interests of citizens. Certainly, neither tax impact nor the relatively few services rendered within the City of Midland should compel the State to vest practically all voting power in the city residents to the virtual denial of a voice to those who are dependent on the county government for roads, welfare, and other essential services.

III.

I have said that in my judgment we should not decide this case but should give Texas a chance to come up with an acceptable result. Texas' own courts hold that the present system is constitutionally intolerable. The 1963 population estimates relied upon in this case show that the City of Midland with 67,906 people has one representative, and the three rural districts, each of which has its own representative, have 852, 414, and 828 people respectively. While it may be that this cannot be regarded as satisfying the Equal Protection Clause under any view, I suggest that applying the Court's formula merely errs in the opposite direction: Only the city population will be represented, and the rural areas will be eliminated from a voice in the county government to which they must look for essential services. With all respect, I submit that this is a destructive result. It kills the very value which it purports to serve. Texas

should have a chance to devise a scheme which, within wide tolerance, eliminates the gross under-representation of the city, but at the same time provides an adequate, effective voice for the nonurban, as well as the urban, areas and peoples.[29]

[29] Cf. Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col. L. Rev. 21, 40–49 (1965).

SUPREME COURT OF THE UNITED STATES

No. 39.—October Term, 1967.

Hank Avery, Petitioner,
v.
Midland County, Texas, et al.
} On Writ of Certiorari to the Supreme Court of Texas.

[April 1, 1968.]

Mr. Justice Stewart, dissenting.

I would dismiss the writ as improvidently granted for the reasons stated by Mr. Justice Harlan and Mr. Justice Fortas.

Since the Court does reach the merits, however, I add that I agree with most of what is said in the thorough dissenting opinion of Mr. Justice Fortas. Indeed, I would join that opinion were it not for the author's unquestioning endorsement of the doctrine of *Reynolds* v. *Sims*, 377 U. S. 533. I continue to believe that the Court's opinion in that case misapplied the Equal Protection Clause of the Fourteenth Amendment—that the apportionment of the legislative body of a sovereign State, no less than the apportionment of a county government, is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic. My views on that score, set out at length elsewhere,* closely parallel those expressed by Mr. Justice Fortas in the present case.

**Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 744 (dissenting opinion).